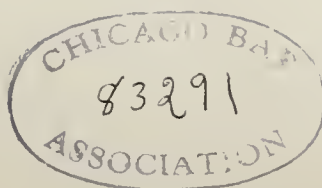


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SYLVIA C. MOORE,

Plaintiff-Appellee,

v.

JAMES B. MOORE,

Defendant-Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

1 25 1. A. 21 09

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from an award of alimony pendente lite in an action for separate maintenance. Verified pleadings were filed and a hearing was had on the plaintiff's motion for temporary alimony, attorney's fees and other relief, which resulted in an order granting plaintiff \$50 per week temporary alimony. That order is the subject of this appeal. Appellant here contends that the Chancellor abused his discretion in making the award because there was no showing of plaintiff's probable grounds for bringing the action or her need for financial assistance while doing so.

The authority for awarding, after a hearing, temporary alimony emanates in the Separate Maintenance Act of Illinois. (Ill. Rev. Stat. 1959, Chap. 68, sec. 22). Pursuant to that section, the court may make ". . . such allowance of temporary alimony, attorney's fees, and suit money as may appear just and equitable, as in cases of divorce." Ill. Rev. Stat. 1959, Chap. 40, sec. 16, dealing with divorce, provides in part ". . . no order or decree for alimony shall be entered until the court or

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a Master in Chancery or Special Commissioner to whom the court may refer the cause, shall have determined from the evidence the condition in life of the parties and their circumstances."

To be entitled to a "just and equitable" award the wife must show that the action is brought in good faith, that she is without sufficient means of maintaining her station in life and that the husband has sufficient means or earning capacity. *Harding v. Harding*, 144 Ill. 588; *Grossman v. Grossman*, 315 Ill. App. 345; *Ross v. Ross*, 127 Ill. App. 542.

In the case at bar, the Chancellor had the requisites clearly before him, and his conduct of the hearing reflects his understanding of the issues to be considered in awarding temporary alimony. Disputed evidence was presented to him on the questions of appellee's good faith or probable cause for bringing the separate maintenance action and appellee's need for the court's assistance in obtaining support from her husband during the course of the litigation.

On the question of good faith in bringing the action, a consideration of the complaint reveals that it alleges a valid marriage between the parties, a desertion by the husband without any just cause or provocation and his continued absence from the marital home in which appellee now resides. If true, these allegations form a sufficient basis for a decree of separate maintenance. Appellant's answer denied the allegations of the complaint and thus, formed issues. In addition to a consideration of the pleadings, the Chancellor received appellee's testimony

that after being in poor health for some time, she entered a sanitarium for treatment, and that upon her release, appellant refused to live with her in the marital home, absenting himself therefrom up to the date of the hearing. Reception of this evidence, along with a consideration of the verified pleadings, comprised a sufficient inquiry into appellee's good faith in bringing the action to warrant an exercise of the Chancellor's discretion.

On the question of the financial circumstances of the respective parties, the Chancellor received appellee's testimony of extensive stock holdings, yielding approximately \$4,000 in dividends which were then split equally between appellee and her Mother, pursuant to an agreement known to appellant before the marriage. She also testified that she received about \$3000 from a trust and from royalties on books she had written, but that both of these sources of income were due to diminish during the pendency of the action. Her expenses were placed at a high figure and included tuition, medical and mortgage payments of a substantial amount. Appellant estimated that his income for 1958 of \$12,000 in salary, bonus income, compensation as secretary of a cooperative apartment and Naval Reserve pay would total \$14,000 before taxes. He also testified that he was burdened with substantial expenses. This presentment of detailed income and expense information on each side placed before the Chancellor sufficient information for the exercise of his discretion.

Whether temporary alimony should be allowed, and, if so, how much, are questions resting in the sound judicial discretion

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of the trial court in view of the conditions and circumstances of each case, and an abuse of discretion is necessarily subject to review. Unless, however, there is clearly an abuse of the discretion, the decree will not ordinarily be disturbed on appeal. *Cooper v. Cooper*, 185 Ill. 163; *Bush v. Bush*, 316 Ill. App. 295.

In this case, the Chancellor was fully apprised of the dispute as to the facts and the applicable law. We are unable to say that the award here questioned resulted from an abuse of the discretion lodged in the Chancellor. We express no opinion on the propriety of the amount granted as an indication of what a permanent award, if any, should provide. To decide whether a permanent award should be granted and its amount are the purposes of the trial, not of the hearing which has been discussed above. The order is affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., CONCUR.

NETA MATSON,

v.

Appellee.

COOK COUNTY

25 I.A. 2d 0

Her petition, embracing some forty pages of the abstract is argumentative, replete with conclusions and intemperat concerning the conduct of the trial and of the attorneys parties. Although she incorporates in the abstract a "

of Proceedings at Trial and Hearing on Petition and Affidavit," it bears no certification by the judge and no showing that it was ever presented to him. Stripped of its verbiage and reduced to factual statements, the salient charges and allegations may be summarized as follows: (1) that following the accident defendant, by her conduct, lulled plaintiff into a false sense of security by promising to settle the case, and by reason thereof she was prevented from properly presenting it on trial; (2) that the attorney who represented plaintiff at the time of the trial was guilty of negligence and misconduct in failing to advise her of the date of the trial, in refusing to assist her in procuring subpoenas to secure the attendance of witnesses, in refusing to argue the case and to present proper evidence to the jury, in refusing to follow up her complaint to him that only eleven jurors signed the verdict, in omitting pertinent medical evidence; (3) that defendant's attorney was guilty of misconduct in "snarling, raving and ranting to unduly harass and torment her during the time when she had no attorney to aid her," and that defendant gave false and perjured testimony; and (4) that when her doctors testified at the trial, none of them could be positive as to the particular matters concerning her injuries because they did not have ample time to study or obtain the X-rays.

In addition to the foregoing principal grounds alleged in her petition, plaintiff also charges that a juror signed the verdict after it was returned and filed, that foreign, irrelevant and immaterial matters were injected into the trial by defendant's

of error. *Knecht v. Sincox*, 376 Ill. 586. The reviewing court decides cases on the record rather than on theories of counsel. *Swift & Co. v. Dollahan*, 2 Ill. App. 2d 574. Likewise, the record filed in the court of review must present fairly and intelligently to the appellate court the substance of those portions of the record on which error is assigned. *Eyer v. Read*, 345 Ill. App. 293; *Miller v. Green*, 345 Ill. App. 255. Nor is it the duty of the successful litigant to supply the deficiencies in the record. *People v. N.Y. Cent. RR.*, 388 Ill. 382. The rule is well settled that the error of fact reviewable under section 72 must be some error unknown to the court when judgment was entered, as well as one that would have precluded the entry of the judgment if it had been known at the time. *Mitchell v. Eareckson*, 250 Ill. App. 508; *McCord v. Briggs & Turivas*, 338 Ill. 158. Fraud as the basis for vacating a judgment must be committed by one of the parties on the court; perjury by a witness does not satisfy such a requirement. *People v. Drysch*, 311 Ill. 342.

We find nothing of record from which it can be determined that the trial judge erred in denying plaintiff's motion to set aside the verdict and judgment under the provisions of section 72. A considerable portion of plaintiff's petition is devoted to allegations that she was lulled by defendant into a false sense of security by promises of settlement. These allegations, if true, would not constitute ground for relief under section 72. Under similar circumstances the court, in *Chmielewski v. Marich*, 350 Ill. App. 379 (*aff'd* 2 Ill.2d 568), held that the defendants

were guilty of "lack of diligence" and not entitled to have the judgment vacated.

We have heretofore detailed the several particulars in which plaintiff claims her attorney was negligent in handling the trial of her case. Section 72 was not intended to relieve a party of the consequences of his own negligence. *Cramer v. Ill. Commercial Men's Ass'n*, 260 Ill. 516; *People v. Ogbin*, 368 Ill. 173. This includes incompetency of counsel. *People v. Gleitsman*, 396 Ill. 499. It was held in *Greene v. People*, 402 Ill. 224, and in *Guth v. People*, 402 Ill. 286, that a party may not avail himself of the provisions of section 72 unless it is made to appear that "without negligence on his part" the error of fact was not made to appear to the trial court. With respect to the charge in the petition that defendant's attorney was guilty of misconduct in harassing plaintiff, it must be assumed that the conduct of counsel was seen and observed by the trial judge and was therefore not an error of fact, as required by law. *People v. Bristow*, 391 Ill. 101; *Lineham v. Travelers Ins. Co.*, 370 Ill. 157. It is also well settled that the giving of false or perjured testimony is not one of the errors of fact which can be reached by a motion under section 72. *Holtzman v. People*, 5 Ill. App. 2d 120; *Hall v. People*, 402 Ill. 478. Plaintiff's petition charges that the doctors called by her did not support her contentions as to injuries because they were not adequately prepared in time before trial. These charges are nothing more than allegations that her own attorney was negligent in failing to notify her of the trial date. Moreover, no motion

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PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

v.

EUGENE J. TOMASZEK,

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

25 I.A. 21

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with violation of section 24 of the Medical Practice Act (Ill. Rev. Stat. 1957, Ch. 91), in that he X-rayed, diagnosed and treated a patient as a chiropractor, when, in fact, he was not licensed as such in the State of Illinois. A jury found him guilty, and he was placed on probation. He appeals from the denial of his motion in arrest of judgment.

It is stipulated that the criminal information filed in the case was signed by Charles I. Fleming, as "Judge of the County Court of Cook County, Illinois," and not by Judge Otto Kerner, the duly elected County Judge of Cook County, and that defendant's motion in arrest of judgment was grounded on the theory that the information was void because of that fact.

The questions are whether Judge Fleming, an interchange county judge, had jurisdiction to endorse the information, and, if so, whether he should have described himself as "Acting Judge."

Defendant argues that the information was void and invalid from the beginning and, therefore, the judgment of

conviction entered upon a void information is not merely erroneous but void for want of jurisdiction of the subject matter, and may be attacked at any time, either in a direct proceeding on review or collaterally. The People v. Edge, 406 Ill. 490, 494 (1950).

This court takes judicial notice of the fact that Charles I. Fleming was a Judge of the City Court of the City of Litchfield, Illinois, and that Judge Otto Kerner was the duly elected County Judge of Cook County, Illinois, at the time of the signing of the information in question. Therefore, we presume, in the absence of evidence in the record to the contrary, that Judge Fleming was presiding in the County Court of Cook County, at the time in question, upon the request of those authorized by law to empower him to serve in such county court, and we presume the existence of circumstances justifying him in so presiding. Masover v. Gilbert, 18 Ill. App. 2d 81, 82 (1950); Stricker v. Kubusky, 35 Ill. App. 159, 160 (1889).

When an interchanged judge properly assumes jurisdiction in a particular cause, his acts within his jurisdiction become those of the court. As the information was endorsed by Judge Fleming, his title designation was not controlling. The statutes providing for the interchange of judges (Ill. Rev. Stat. 1957, Ch. 37, §§298, 338) do not indicate the title or designation to be used by the substituting judge. We believe that it was intended that the interchanged judge assume the title or designation of the judge of the court in which he is acting, without

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rigidity of description. Therefore, we think it was proper for Judge Fleming, when acting as the Judge of the County Court of Cook County, to endorse an information as was done in the instant case, even though he did not include "Acting" in his title designation.

For the reasons stated, we hold that Judge Fleming was properly performing the duties of the County Court, and that the instant information bearing his name is valid. The judgment of the trial court is, therefore, affirmed.

AFFIRMED.

KILEY AND BURMAN, JJ., CONCUR.

ABSTRACT ONLY.

distribution and service in North and South America and the islands adjacent thereto of miniature pocket-sized recorders known as "Minifon" and other Protone products. The joint venture to commence upon the termination of the Geiss-America contract with Protone expiring on March 12, 1959.

The agreement further provided that Rubin would be the managing director for a period of three years and receive \$400.00 per week; that Stach and Protone would have a 51% interest and Rubin 49%; and that each of the parties would contribute their proportionate share of the working capital necessary for the operation of the business and would share in the profits in proportion to their interests. The negotiations were conducted in Chicago, New York City and Hamburg, Germany. There was an exchange of correspondence and in order to consummate the negotiations Rubin went to Hamburg, Germany in September, 1958, at the request of Stach and Protone and made financing arrangements.

Rubin charges that the joint venture agreement created a fiduciary relationship between the parties; that the defendants Geiss-America had full knowledge of the existence of the fiduciary relationship and acquiesced in and consented to it; and that notwithstanding the existence of their fiduciary relationship with him, Stach and Protone contracted with Geiss-America for the exclusive distribution of Minofon in the United States of America for a period of five years commencing with the termination of their contract; that Stach and Protone have no other assets in the United States of America, other than the amounts due them from Geiss-America;

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and that Rubin has to look to those funds for damages. Rubin prays for a preliminary and permanent injunction restraining Geiss-America from paying any sums to Stach and Protona until such time as the damages sought were fully paid; that the defendants to be required to make a full accounting of all sales of "Minofon" and accessories in the United States of America from March 12, 1959, until March 11, 1962; and that judgment for damages against all defendants be given to Rubin for all profits and compensation he would have been entitled to under the agreement.

The defendants' motion to strike and dismiss the complaint stated, among other things, that the oral agreement could not be performed within one year, and therefore is void and unenforceable under the Illinois Statute of Frauds; that complaint does not state any ground for equitable relief; and that the plaintiff has an adequate remedy at law.

The chancellor found that: "The alleged contract was not in writing and is in violation of the statute of frauds. Moreover, the agreement alleged is uncertain. Added to this, if plaintiff is entitled to any relief, such relief will be accorded in a court of law." The court dismissed the plaintiff's complaint and denied a motion to amend.

The question which presents itself at the outset of the consideration of this case is whether the chancellor properly found that there was no basis for equity to assume jurisdiction.



The claim of plaintiff is based on a breach of an agreement for a joint venture to take place at the termination of the contract between Stach and Protona and Geiss-America. The joint venture itself was never actually accomplished.

The relief prays for an injunction to tie up defendants' funds before there has been an adjudication of the plaintiff's claim for damages in an action at law. To grant a preliminary injunction in the case at bar as requested by plaintiff may result in irreparable harm to the defendants. Plaintiff has not cited any case that would support his position for equitable relief where the business of either the partnership or the joint venture has not yet been commenced as in the instant case.

It is well settled that a creditor cannot enforce his legal demand in an equity court. "In order to show that there is no adequate remedy at law, it must appear that there is a judgment at law, execution issued and returned unsatisfied." *Clark v. G. A. Ball-Bearing Mfg. Co.*, 245 Ill. App. 579, 580. The institution of legal proceedings does not entitle plaintiff to restrain defendant from disposing of his property, even though the disposition might prevent collection of a possible judgment. 43 C.J.S., Injunctions, §72. As the court noted in refusing to grant an injunction in *Palmetto Guano Corp. v. Green*, 138 S.C. 106, 136 S.E. 132, 134: "He [plaintiff] cannot obtain by injunction something that will tie up a man's property." In that case plaintiff thought a deficiency judgment would be

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recovered and sought to restrain defendant from disposing of certain stock. In a personal injury action (Martin v. James B. Berry Sons' Co., 83 F.2d 857 (1st Cir. 1936)) where plaintiffs sought to restrain defendant from transferring assets to another jurisdiction, the court refused to grant the injunction noting that to place this restriction on defendant's working capital would result in great inconvenience. The court also commented that the possibility of plaintiff's having to go to another state to collect on the judgment did not render the remedy at law inadequate.

We think the chancellor properly found that there was no basis for equity to assume jurisdiction. However, we feel that he should have transferred the cause to a law court, where plaintiff might have an opportunity to file an amended complaint.

We believe a discussion of the other points raised by both parties, at this time, is unnecessary. The cause is remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED
IN PART AND REMANDED.

MURPHY, P.J. AND KILEY, J. CONCUR.

ABSTRACT ONLY.

47811

MITCHELL MANUFACTURING COMPANY,
a corporation,

Appellee,

v.

COOPER-JARRETT, INC., a
corporation,

Appellant,

and

CROOKS TERMINAL WAREHOUSES, INC.,

Third Party Defendant,

Appellee.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

25 I.A. 93^{2d}

MR. JUSTICE McCORMICK DELIVERED THE
OPINION OF THE COURT.

This appeal is taken from a summary judgment entered by the Municipal Court of Chicago against Cooper-Jarrett, Inc. (hereafter referred to as "Cooper") in favor of Mitchell Manufacturing Company (hereafter referred to as "Mitchell") in the sum of \$2,519.30, and from a summary judgment entered against Cooper in favor of Crooks Terminal Warehouses, Inc. (hereafter referred to as "Crooks") on a third party statement of claim filed by Cooper, and assessing costs against the third party plaintiff, Cooper. No appearance was filed in this court in behalf of Crooks.

Cooper here contends that the judgments are improperly entered and that there was in the case a genuine issue of fact.

In order to determine whether or not the trial court properly entered summary judgments upon the pleadings,

motions, affidavit and depositions before it, it is necessary to consider the documents upon which the court relied.

Mitchell filed a verified statement of claim on August 20, 1958 asking damages in the sum of \$2,519.30 against Cooper. Cooper filed a verified defense thereto. Cooper then was permitted on December 17, 1958, by order of court, to add Crooks as a third party defendant, summons to issue. Cooper filed a verified statement of claim against third party defendant Crooks, to which Crooks filed a verified defense. Crooks then took a discovery deposition of Milton Paul Holland, the general claim agent of Cooper, and of Carl Ramsdorf, employed as a truck driver by Cooper.

Crooks on March 5, 1959 filed a motion pursuant to section 57 of rule 1 of the Municipal Court of Chicago asking for summary judgment in its favor on the third party statement of claim, and incorporated both of the discovery depositions therein, and set out as a basis for the entry of summary judgment the fact that both Holland and Ramsdorf had identified Crooks's Exhibit No. 4 attached to the depositions and the signature thereon, which it is alleged was an acknowledgment of receipt by Cooper of the goods, wares and merchandise described in the original statement of claim (to-wit, 185 air-conditioners), and that there is between Cooper and Crooks no "genuine triable issue of fact" with respect to the delivery or receipt of the goods.

Mitchell on March 24, 1959 filed a motion for

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summary judgment in which it alleged, among other things, that in its complaint it brought action against Cooper for \$2,519.30, the value of 14 air conditioners, and that Cooper in its answer admitted that it had delivered only 171 air conditioners to the consignee; that at a deposition hearing Cooper's employee admitted signing a bill of lading acknowledging the receipt of 185 air conditioners; that the bill of lading specifically states that 185 units were carried on Cooper's trailers Nos. 2043 and 32; that the bill of lading receipt is attached to the transcript of the deposition filed in court by Crooks, which deposition Mitchell makes a part of its motion; that Cooper having on its bill of lading admitted receiving 185 air conditioners, property of Mitchell, and having admitted by its answer that only 171 air conditioners were delivered, "it is estopped from denying its liability to the plaintiff for the 14 air conditioners it failed to deliver."

In the deposition of Holland he identified various exhibits produced by him from the records of Cooper concerning the transaction, which exhibits are attached to and became a part of the deposition. The deposition of Carl Ramsdorf described what he did on the day in question.

Cooper in opposition to the motions for summary judgment filed an affidavit of Carl E. Ramsdorf.

All of these documents were before the court at the time it entered the summary judgments.

From the pleadings it appears that Cooper admitted that it delivered to the consignee 171 air conditioners and that there were 14 air conditioners which Mitchell alleged were placed on the trucks of Cooper which were not delivered. The issues raised by the pleadings are, first, whether or not 185 air conditioners were placed on Cooper's trucks on the day in question, and second, as to the value of the 14 air conditioners admittedly not delivered to the consignee. Between Cooper and Crooks two issues are also raised. The first is as to whether or not there had been 185 air conditioners loaded on Cooper's trucks, and the second as to whether or not the air conditioners were loaded on Cooper's trucks by Crooks.

The depositions in the record are discovery depositions and are governed by rule 19—10 of the Supreme Court, which provides that discovery depositions may be used only for the purpose of impeachment or as an admission of a party, his officer or agent, in the same manner and to the same extent as any other admission made by that person. From the depositions Mitchell and Crooks can rely on the admission that there was a bill of lading issued which indicated that Cooper had accepted 185 air conditioners to be delivered to the consignee and that such bill of lading was signed by Ramsdorf, an employee of Cooper. There was also an admission that Mitchell was billed and paid \$537.40 freight to Cooper and that the bill indicated that the freight covered the shipment of 185 air conditioners, together with the aggregate

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weight of the shipment.

The pleadings admit that only 171 items were delivered to the consignee. The question as to the loading and the delivery to the consignee of 14 air conditioners on truck No. 32 is not in issue. It is apparent from the record that the 14 units were loaded on the truck and were delivered therefrom to the consignee. The only dispute is with reference to Cooper's trailer No. 2043. Mitchell says that at the time the trailer left Crooks it contained 171 units; Cooper says it contained 157 units.

In the first instance the plaintiff has the burden of proving delivery of the goods to and acceptance thereof by the carrier, and when the plaintiff has made out a prima facie case on this issue the burden is on the carrier to prove non-delivery. 13 C.J.S. Carriers, sec. 254 (p. 537); 6 I.L.P. Carriers, sec. 194. A bill of lading is prima facie evidence of the matters contained therein, (I.C. R.R. Co. v. Cobb, Blaisdell & Co., 72 Ill. 148; Great Western R.R. Co. v. McDonald, 18 Ill. 172), but insofar as the bill of lading is a receipt for goods delivered to a carrier for the purpose of transportation it is, as between the original parties thereto, open to explanation and contradiction (6 I.L.P. Carriers, sec. 107; Strohmeyer & Arpe Co. v. American Line S.S. Corp., 97 F.2d 360; Louisville & N.R. Co. v. Cullman Warehouse, 226 Ala. 493, 147 So. 421.

In this case the explanation advanced in the

counteraffidavit filed by Cooper is that Ramsdorf arrived at Crooks after trailer 2043 was loaded; that he did not supervise the loading or count the units, nor could he have counted them if he had so desired; that the loading was done by employees of Crooks and that after the trailer was loaded the same employees placed their seal upon the door; and that he (Ramsdorf) signed the bill of lading indicating that 171 units were loaded in the trailer solely upon the representation of Crooks's employee.

It is also the law that when a shipper undertakes to load or weigh or count the goods when delivered to the carrier the burden is on him to show the amount delivered to the carrier, (13 C.J.S. Carriers, sec. 254 (p. 537); Almon v. Chicago & N. W. Ry. Co., 144 N.W. 997, 163 Iowa 449; Produce Trading Co. v. Norfolk Southern R. Co., 100 S.E. 316, 178 N.C. 175), and such a rule is based upon reason as well as authority. In this case the uncontradicted affidavit of Ramsdorf puts the full control of the loading, including the sealing of the loaded trailer, in Crooks, and Ramsdorf states that he relied solely upon the representation of Crooks's agent as to the amount of units in the trailer. Ramsdorf's affidavit is uncontradicted. The explanation therein contained is sufficient to negate the bill of lading initialed by him and thus destroys the prima facie case which Mitchell had established by the introduction of the bill of lading acknowledging that Cooper had received 171 air conditioners on the trailer. The burden of proving the number of units in the trailer is upon the

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plaintiff Mitchell. Once the efficacy of the bill of lading as an admission is destroyed there is no evidence in the record sustaining Mitchell's contention that 171 units were received by Cooper.

Mitchell also urges that Cooper is estopped to deny that it had received the units after it had issued its bill of lading acknowledging their receipt, and relies on section 22 of the Federal Bill of Lading Act (49 U.S.C.A. sec. 102), which provides that when a bill of lading has been issued by a carrier or its agent the carrier shall be liable to " * * (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, * * * for damages caused by the nonreceipt by the carrier of all or part of the goods * * *." In its brief Mitchell admits that as between the consignor of goods and a receiving carrier it is ordinarily true that recitals in a bill of lading as to goods shipped raise only a rebuttable presumption that the goods were delivered for shipment, but it contends that under the facts and circumstances in the instant case an estoppel would result, and in support of that it cites American Hide Co. v. Southern Ry. Co., 310 Ill. 524, in which case is cited Johnson Lumber Co. v. Great Northern Ry. Co., 104 Wash. 354, 176 P. 343. The rule therein stated is not applicable because in both the American Hide Co. case and the Johnson Lumber Co. case the plaintiff is a purchaser for value who had purchased relying on the bill of lading.

These cases do not change the rule that the recitals in a bill of lading with reference to receipt of goods are rebuttable and subject to explanation.

Mitchell also argues that it comes under the statute inasmuch as it paid freight charges covering 185 units and that it relied on the receipt by Cooper appearing on the face of the bill of lading, and therefore because of such reliance did not check or supervise the loading or weighing of the air conditioners. It also urges that since Cooper collected freight charges predicated on the weight applicable to 185 units it should have refunded or tendered a refund to Mitchell of that part of the freight charges applicable to 14 units which it is admitted were not delivered. The weakness with this contention is that the goods were, as appears from the affidavit of Ramsdorf in the record, loaded on the trailer by the employees of Crooks. Mitchell says that that is immaterial since Crooks was merely a bailee and not the agent of Mitchell. It is evident from the documents that Crooks was not acting under the supervision and control of Cooper. It is also evident that it was acting either under the specific directions or with the acquiescence of Mitchell. Whether Crooks in loading the units on Cooper's trailer was the agent of Mitchell could be determined from the contract of bailment between them. There is nothing in the record indicating what the terms of such contract were. Furthermore, there is nothing in the record indicating that the weight indicated on the freight bill was the weight of 185 units nor that the freight bill was specifically based upon



the carriage of 185 units. There are not sufficient facts in the record from which an estoppel can be inferred.

The purpose of a summary judgment is not to try disputed issues of fact by affidavit but to provide a means to avoid the expense and delay of a trial when no sound defense exists, and such a judgment cannot be entered where there is a real issue of fact. Allen v. Meyer, 14 Ill. 2d 284; Shirley v. Ellis Drier Co., 379 Ill. 105; Diversey Liquidating Corp v. Neunkirchen, 370 Ill. 523. We are not passing on the issues raised in the case but we are merely passing on the question of whether or not summary judgments were properly allowed. On inspection of the documents in support of and in opposition to the summary judgments it is apparent that there were genuine issues of fact left undisposed of.

In the instant case, while no point has been raised concerning it, and while we are not using it as a basis for our decision, we note that no evidence has been introduced by Mitchell to establish the value of the 14 units which were not delivered to the consignee, and even if the material presented to the trial court had been sufficient for it to enter a summary judgment in favor of Mitchell, such judgment must necessarily have been a partial one leaving the question of damages open.

The entry of summary judgments by the court was error. The judgments of the Municipal Court are reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.
Dempsey, P.J., and Schwartz, J., concur.

Abstract only.

The first part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the language over time. The second part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the language over time. The third part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the language over time. The fourth part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the language over time. The fifth part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the language over time. The sixth part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the language over time. The seventh part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the language over time. The eighth part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the language over time. The ninth part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the language over time. The tenth part of the paper discusses the importance of the study of the history of the English language. It is a branch of linguistics which deals with the changes in the language over time.

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LUCILLE CHMELIK,

Appellant,

v.

EDWARD CHMELIK,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

25 I.A. 1321^{2d}

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from the denial of her petition seeking the vacation of an ex parte order, which retroactively suspended divorce decree provisions for the support and maintenance of her three minor children.

On November 7, 1955, in an uncontested divorce, a decree was entered in favor of plaintiff, which awarded sole custody of the minor children to plaintiff and directed defendant to pay to plaintiff the sum of \$45 weekly for the support and maintenance of the minor children, "subject to the right of visitation" of defendant.

The ex parte order entered on April 14, 1958, recites that due notice of the motion, together with copy of the petition, had been served on plaintiff. The order suspended the child support provisions of the divorce decree "as of June 10, 1957, * * * until this Court shall otherwise direct." The petition alleges that the parties entered an agreement effective June 10, 1957, whereby plaintiff waived her right to child support in return for defendant waiving his right of visitation, as her

-2-

new husband had assumed all parental responsibilities for the minor children, and no contributions from defendant would be necessary, and plaintiff would take the necessary steps to procure a court order suspending the support provisions of the decree; that although defendant carried out his part of the agreement and did not avail himself of his visitation rights, plaintiff did not apply for the suspension order.

On August 8, 1958, plaintiff petitioned to set aside the order of April 14, 1958, and to order defendant to pay the arrearages amounting to \$1620. The petition alleges that plaintiff, upon receipt of the notice and copy of petition on which the order of April 14, 1958, is based, telephoned defendant, and he agreed to withdraw his petition; that it was then agreed that plaintiff would accept \$100 a month for support and maintenance of the minor children, beginning with May, 1958; and that the order of April 14, 1958, was wrongfully and fraudulently obtained by defendant, contrary to their agreement.

Defendant's answer to plaintiff's petition denies that he ever agreed to withdraw his petition, and alleges that plaintiff was fully informed that he intended to seek an order in accordance with the petition, and that it was because plaintiff had failed and neglected to petition for approval of the agreement of the parties; and that it became necessary for defendant to procure the order of April 14, 1958. Plaintiff's reply denies she made any agreement with defendant to waive child support or for him to waive his visitation rights.

On June 1, 1959, the chancellor entered an order denying plaintiff's petition to vacate the order of April 14, 1958; after "having considered the sworn testimony of the respective parties and the exhibits introduced into evidence as well as the decree and proceedings on file herein; the Court * * * finds that there is no merit to the allegations contained in said petition of plaintiff and that the facts and equities are in favor of this defendant."

The record on appeal does not include a report of the proceedings at the hearing of plaintiff's petition to vacate the order of April 14, 1958. As defendant contends, where the order appealed from recites that the court heard testimony and was fully advised in the premises, the presumption is that there was sufficient evidence to sustain the court's findings, and that the judgment of the trial court is in accordance with the justice of the case. (In re Estate of Murray v. Appeal of Murray, 310 Ill. App. 121, 126 (1941).) Therefore, on the appeal record in this court, we must assume that the evidence was sufficient to support the chancellor's findings, unless, as plaintiff argues, the order of April 14, 1958, is void because it is against public policy or because the court lacked the jurisdiction to enter it.

The chancellor, on application from time to time, may make such alterations in the allowance of child support as shall appear reasonable and proper. (Ill. Rev. Stat., 1957, Ch. 40, §18.) Past due installments of alimony or child support cannot be modified by any subsequent order of the court which originally

entered the order. (Hallett v. Hallett, 10 Ill. App. 2d 513, 519 (1956).) The duty of a parent to support his minor child arises out of a natural relationship, and the claim for support of children is one which transcends any contractual obligation and cannot be the subject of barter. (Nelson v. Nelson, 340 Ill. App. 463 (1950).) The welfare of the children is the controlling consideration, and the court may alter, amend, enlarge or diminish the decree provisions for the support and maintenance of the children, as shall appear reasonable and proper. While visitation rights cannot be the subject of barter, changes in conditions and circumstances of the parties may justify a modification of those provisions, and the application must be made in the court where the decree was rendered and is addressed to the sound discretion of the court. Orders allowing visitation by a parent are favored to the end that the child may not be estranged from its parents, and the court is allowed broad discretion in adjusting this privilege. 16 I.L.P., Divorce, pp. 383, 387, 393.

We believe the chancellor, in the use of sound discretion, had jurisdiction to suspend the decree provisions for child support on a proper application made in apt time. Therefore, in the absence of a report of proceedings, we presume the evidence and exhibits were sufficient to support the chancellor's approval of the agreement of the parties, as of the date it was made, and in finding that there was no merit to the allegations

-5-

contained in plaintiff's petition, and that the facts and equities were in favor of defendant.

We conclude that the order of April 14, 1958, and the order of June 1, 1959, were within the sound discretion of the court, and the record fails to show any abuse of that discretion.

For the reasons given, the order appealed from is affirmed.

AFFIRMED.

KILEY AND BURMAN, JJ., CONCUR.

ABSTRACT ONLY.

251

FILED

MAR 31 1960

Abstract

PAUL V. WUNDER
Clerk Appellate Court Second District

No. 11359 Publish abstract only Agenda 11

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, SECOND DIVISION
FEBRUARY TERM, A. D. 1960
2nd DIVISION
25 I.A.^{2d} 192²

CHRIS LOTTA,)	
)	
Plaintiff-Appellee,)	
)	
vs.)	Appeal from
)	Circuit Court of
ALEX NOBLE,)	Winnebago County.
)	
Defendant-Appellant.))	

WRIGHT -- J.

This action was brought by the plaintiff, Chris Lotta, a plumbing and heating contractor, against the defendant, Alex Noble, to recover for work done and material furnished under an oral contract and for work done on a time and material basis. The case was tried before the court without a jury and judgment was entered on the finding of the court in the amount of \$3,885.68, from which judgment the defendant appeals. The suit involves three plumbing jobs done by plaintiff in three separate buildings owned by defendant located on Rockton Avenue, Woodlawn Avenue and Mulberry Street in the

11/11/1932

PAUL A. WILSON
State Attorney General

11/11/1932

TO THE HONORABLE JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK

2nd Division

IN SENATE
JANUARY 1, 1933

1932

STATE OF NEW YORK	IN SENATE
JANUARY 1, 1933	
REPORT OF THE	
COMMISSIONERS OF THE	
LAND OFFICE	

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE, STATE OF NEW YORK, FOR THE YEAR 1932.

THE COMMISSIONERS OF THE LAND OFFICE, STATE OF NEW YORK, have the honor to acknowledge the receipt of the report of the COMMISSIONERS OF THE LAND OFFICE, STATE OF NEW YORK, for the year 1932, and to present the same to the SENATE.

The report of the COMMISSIONERS OF THE LAND OFFICE, STATE OF NEW YORK, for the year 1932, contains a detailed statement of the work of the COMMISSIONERS OF THE LAND OFFICE, STATE OF NEW YORK, during the year 1932, and a statement of the work of the COMMISSIONERS OF THE LAND OFFICE, STATE OF NEW YORK, during the year 1931.

The report of the COMMISSIONERS OF THE LAND OFFICE, STATE OF NEW YORK, for the year 1932, contains a detailed statement of the work of the COMMISSIONERS OF THE LAND OFFICE, STATE OF NEW YORK, during the year 1932, and a statement of the work of the COMMISSIONERS OF THE LAND OFFICE, STATE OF NEW YORK, during the year 1931.

City of Rockford, Illinois.

An oral agreement was entered into between the parties whereby plaintiff was to install certain fixtures to be purchased and furnished by the defendant in the building owned by defendant located on Rockton Avenue for which plaintiff was to be paid \$50.00 per fixture for labor furnished, and was to be paid in addition for any fittings and material furnished by plaintiff in completing the installations.

Under a similar agreement, plaintiff was to install plumbing fixtures in defendant's building located on Woodlawn Avenue.

It was also orally agreed that plaintiff was to install fixtures in five bathrooms in the building owned by defendant located on Mulberry Street, for which plaintiff was to be paid \$700.00. During the progress of the work in the building located on Mulberry Street, the city plumbing inspector made an inspection and required that the sewer pipes in the basement of the building be replaced and that certain kitchen sinks be vented. Following the report of the plumbing inspector, the plaintiff advised the defendant that he could not separate the work of installing bathroom fixtures, replacing sewer pipe and venting the kitchen sinks and that it would be necessary that the work in the Mulberry Street building be

CITY OF NEW YORK, Illinois.

An oral agreement was entered into between the parties whereby plaintiff was to install certain fixtures in the premises and furnished by the defendant in the building owned by defendant located on Jackson Avenue for which plaintiff was to be paid \$50.00 per fixture for labor furnished, and was to be paid in addition for any fixtures and material furnished by plaintiff in connection with the installation.

Under a similar agreement, plaintiff was to install plumbing fixtures in defendant's building located on Woodburn Avenue.

It was also orally agreed that plaintiff was to install fixtures in five apartments in the building owned by defendant located on Madison Avenue. For which plaintiff was to be paid \$100.00. Being the majority of the work in the building located on Madison Avenue, the city plumbing inspector made an inspection and reported that the same gives in the basement of the building no complaint and that the kitchen sink is working. Referring the report on the plumbing in- spection, the plaintiff advised the defendant that he could not separate the work of installing bathroom fixtures, replacing sewer pipe and venting the kitchen sink and that he would be necessary that the work in the Madison Street building be

done on a time and material basis to which the defendant agreed.

It is the contention of the plaintiff that all work in the three buildings has been completed pursuant to the agreement between the parties and that the work has been accepted as satisfactory by the defendant and that there is due and owing from the defendant, after allowing credit for all payments made, the sum of \$3,885.68.

The defendant contends that the plaintiff, following the completion of the work in the buildings located on Rockton Avenue and Woodlawn Avenue, agreed to reduce the cost of the labor for installing the fixtures from \$50.00 to \$45.00 each and agreed to reduce the price of fittings and material furnished by plaintiff in installing the fixtures by ten percent, which would reduce the amount due on these projects by \$703.93.

Defendant also contends that the charge made by the plaintiff for labor and material furnished in doing the work in the building located on Mulberry Street was not the reasonable and customary charge for such work in the locality and that the charge made was unreasonable and excessive in the amount of \$776.81.

Defendant, Noble, testified that he and the plaintiff, Lotta, were together in February of 1959 and went to the

[illegible]

buildings on Rockton Avenue and Woodlawn Avenue where the work had been done and while there, the plaintiff orally agreed to reduce his charge for materials furnished on these properties by ten percent and agreed to reduce the labor charge for installing each fixture from \$50.00 to \$45.00. Plaintiff in his testimony denied that he agreed to these reductions and his testimony is not only uncontradicted but on the contrary is corroborated by the defendant who testified that he and plaintiff had a conversation about plaintiff reducing his charges; that they tried to agree but could not agree on anything.

[1] The record in this case is void of any evidence which substantiates the claim of the defendant that plaintiff agreed to reduce the charges originally agreed upon for installing the fixtures in the Rockton Avenue and Woodlawn Avenue properties. The evidence discloses that the defendant tried to persuade plaintiff to reduce the amount of his charges, but there is no evidence that defendant agreed to any reduction.

[2] Defendant in his brief apparently relies upon an accord and satisfaction. He did not assert this defense in the trial court, but if such defense had been asserted it could not have been sustained. To constitute an accord and satisfaction there must be an honest dispute between the parties, a tender with the explicit understanding of both parties that it was in full payment of all demands, and an

[illegible]

acceptance by the creditor with the understanding that the tender is accepted in full payment. Apex Motor Fuel Co., v. Stiglitz, et al, 348 Ill. App. 123, 108 N. E. 2d 29.

[3] The defendant in the instant case did not produce any evidence that any tender was made to plaintiff of a lesser amount or that plaintiff accepted any lesser amount in full payment of his demand.

It is undisputed that the parties originally agreed that plaintiff was to install fixtures in five bathrooms in the building located on Mulberry Street and that plaintiff was to be paid \$700.00 for the labor for doing the work. While the work was being done, the city plumbing inspector made an inspection and required that the sewer pipes in the basement of the building be replaced and that certain kitchen sinks be vented. Plaintiff testified that after the inspector had made his report, he, the plaintiff, talked to the defendant and told him of the inspector's request and informed him that because the jobs were so intermingled he could not separate one from the other, and that the whole job would have to be done on a time and material basis. Plaintiff further testified that defendant agreed to this arrangement and this testimony of the plaintiff is uncontradicted in the record.

Plaintiff's Exhibit No. 4, admitted in evidence, lists the work done in addition to the installation of the five

[illegible]

bathrooms, as consisting of installing ninety-five feet of soil pipe in the basement, installing a new clean-out tee in the basement, changing two kitchen sinks, changing two kitchen drains and running vents from the kitchen through the roof, changing another drain and venting it through the roof, changing two ballcocks and P-traps, changing drain pipes for bathroom tub and closet.

In accordance with the agreement of the parties, plaintiff submitted his statement for the work done in the building on Mulberry Street on a time and material basis. Plaintiff testified that all of the materials listed in Plaintiff's Exhibits No. 1, 2, 3 and 4, offered and admitted in evidence, were used in the work done in the defendant's building on Mulberry Street, and further testified that the charge made for the materials was the fair and reasonable price for such materials at the time they were furnished, and further testified that the charge made for the labor in doing the work was fair, reasonable and the customary charge for this type of work in the City of Rockford at that time.

Defendant called Joseph Gasparini, a plumbing contractor in the City of Rockford, who testified that the reasonable price of laying soil pipe in and about the City of Rockford at the time the work here in question was done was \$6.00 per foot, which was less than the amount charged by the plaintiff.

However, this witness testified further that the \$6.00 per foot was not a fixed price but it varied depending upon working conditions that might involve a greater charge if some of the pipe was laid in a crawl space or if there was water in the ditch, and he further testified that different contractors charge different prices. No other evidence was offered by the defendant to contradict the testimony of the plaintiff that the charge made by him for the work done and material furnished in the building located on Mulberry Street was not fair, reasonable and the customary charge for such work in the City of Rockford at that time.

This case is primarily one involving a determination of the greater weight of the evidence and the trial court saw, observed and heard the plaintiff, defendant and other witnesses testify and is in a much better position to pass on the credibility of the witnesses and determine the facts than is a court of review. *Ellet v. Wyatt*, 345 Ill. App. 420, 103 N. E. 2d 526; *Daulton v. Walsh*, 21 Ill. App. 2d 290, 157 N. E. 2d 801.

[4] We are of the opinion that the judgment of the trial court is supported by the greater weight of the evidence.

For the reasons assigned, the judgment of the lower court is affirmed.

J U D G M E N T A F F I R M E D .

[illegible]

모든 것은 다름과 같음의 법칙에 따라 움직인다.

30111burg, P. J. and Crow, J. Connor.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10197

Agenda No. 1

Ralph A. Hatcher, Administrator of the Estate)
of Nina Mae Hatcher, deceased,)

Plaintiff-Appellee,)

vs.)

The New York Central Railroad Company,)

Defendant-Appellant.)

Appeal from the
Circuit Court of
Tazewell County

25 I.A.²¹ 193

ROETH, Justice.

Plaintiff, as administrator of the estate of his deceased wife, brought an action for damages under the wrongful death statute against defendant railroad company for having caused her death by its wrongful act, neglect or default, and recovered a judgment, based upon the verdict of a jury, in the sum of \$25,000. Upon appeal to this court we reversed the judgment without remanding, holding, in effect, that the deceased was guilty of contributory negligence as a matter of law and that consequently the trial court should have directed a verdict for defendant. (20 Ill. App. 2d 481, 156 N.E. 2d 617). The Supreme Court granted plaintiff's petition for leave to appeal and upon consideration of the case reversed our judgment and remanded the cause back to this court with directions to consider other

33

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Page 12. 1

General No. 10117

Walter A. Litcher, Administrator of the Estate of Mrs. Litcher, Deceased,
Plaintiff-Appellant,
vs.
The New York Central Railroad Company,
Defendant-Appellee.

Appeal from the
Circuit Court of
Tennant County

33 1. 1. 133

WORTH, Justice.

Plaintiff, as administrator of the estate of his deceased wife, brought an action for damages under the wrongful death statute against defendant railroad company for having caused her death by its wrongful act, neglect or default, and recovered a judgment, based upon the verdict of a jury, in the sum of \$27,000. Upon appeal to this court he reversed the judgment without reasoning, holding, in effect, that the deceased was guilty of contributory negligence as a matter of law and that consequently the trial court should have directed a verdict for defendant. (23 Ill. App. 2d 411, 135 N.E. 2d 617). The supreme Court granted plaintiff's petition for leave to appeal and upon consideration of the case reversed our judgment and remanded the case back to this court with directions to consider other

alleged errors and to either affirm the judgment of the trial court, or to reverse it and remand the cause for a new trial. (17 Ill. 2d 587, 162 N.E. 2d 362).

As we noted in our original opinion, the questions raised on the initial appeal were three in number, (1) there was no proof of negligence on the part of defendant, (2) the deceased was guilty of contributory negligence as a matter of law, and (3) the damages were excessive.

The Supreme Court has effectively disposed of the second question. In our original opinion we considered the first question at some length and in detail and concluded that there was sufficient evidence to warrant the submission of the question of defendant's negligence to the jury. In commenting on our holding in this regard the Supreme Court said:

"The question as to whether the bell was ringing or a whistle was blowing as the train approached the crossing was disputed upon the trial of this cause. The failure to warn by one or the other of these means was alleged in the complaint and there was ample proof of such failure in the evidence. In effect the jury so found by its verdict and the Appellate Court agreed, saying: 'On the question of negligence on the part of the railroad, we believe there is sufficient evidence in the record to present a question of fact for the jury.'"

We adhere to our original holding that there was sufficient evidence in the record to present a question of fact for the jury as to whether defendant was negligent.

alleged errors and to affirm the judgment of the trial court, or to reverse it and remand the cause for a new trial. (17 Ill. 2d 507, 169 S.W. 2d 301).

As we noted in our original opinion, the question raised on the initial appeal was three in number, (1) there was no proof of negligence on the part of defendant, (2) the deceased was guilty of contributory negligence as a matter of law, and (3) the doctrine of comparative negligence.

The Supreme Court has effectively disposed of the second question. In our original opinion we considered the first question at some length and in detail and concluded that there was sufficient evidence to warrant the submission of the question of defendant's negligence to the jury. In commenting on our holding in this regard the Supreme Court said:

The question is as to whether the ball was ringing as it struck and blowing as the train approached the crossing and whether upon the trial of this case the failure to warn by one or the other of these means was alleged in the complaint and there was sufficient evidence to justify its submission. In our original opinion we held that the evidence was sufficient to justify its submission by its verdict and the Supreme Court agreed, saying: "The question of negligence on the part of the railroad, we believe there is sufficient evidence in the record to present a question of fact for the jury."

We adhere to our original holding that there was sufficient evidence in the record to present a question of fact for the jury as to whether defendant was negligent.

Finally, it is contended that the damages are excessive. The deceased was a young woman of 27 years of age in good health. She had 4 children ranging in age from 7 to 11 years. Two of these children also lost their lives in this occurrence. She and her husband, with their children, were living together. The deceased was a good wife and mother. Under the Carlyle mortality tables the deceased had a life expectancy of 36.41 years. In addition to being a housewife she was steadily employed. At the time of her death she was working an average of 44 hours per week and was being paid \$1.60 per hour for 40 hours and time a half for all over 40 hours. It is a fair inference from the record that she was contributing to the support of the family. From the foregoing we are of the opinion that a \$25,000 verdict cannot be held to be excessive.

Accordingly the judgment of the Circuit Court of Tazewell County will now be affirmed.

Affirmed.

Presiding Justice Reynolds and Justice Carroll concur.

Finally, it is concluded that the samples are considered
The results of a young person of 21 years of age in good health
and a normal weight in the 7 to 11 years. The
these children also have their level of development. The
and not having any other conditions, with living together. The
children are a good size and weight. About the same as actually
reflected the results and a little more than 21 years. In
addition to being a healthy child, the child is actually
the size of the child. The child is average of 44 years
old and not being over 21 years of age. The child is
a girl and not a boy. It is a girl. The child is
because that she is considered to be a child of the family.
from the perspective of all. It is the opinion that a child is
should be able to be considered.

Accordingly, the judgment of the Court is that
Court will be affirmed.

Respectfully,
President Justice and Justice Court, 1999.

47763

SOPHIE L. FISCHER,

Plaintiff - Appellant,

v.

SLAYTON & COMPANY, INC., and HOVEY
E. SLAYTON,

Defendants - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

25 I.A.^{2d} 250

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment in favor of Theodore F. Schlake, her attorney, for fees, and from the finding that he has a lien against funds in the hands of the Clerk of the Circuit Court.

It appears from the briefs that in the original proceedings Schlake filed a chancery action on behalf of plaintiff to recover monies entrusted to Slayton & Company, Inc., and Hovey E. Slayton in the Circuit Court. After the taking of considerable evidence before a master in chancery, the issues were found against the plaintiff. An appeal was taken to this court after a decree was entered sustaining the master. In *Fischer v. Slayton & Co., Inc.*, 10 Ill. App. 2d 167, the decree was reversed and the cause remanded with directions to re-refer the matter to a master for an accounting of plaintiff's damages. While the matter was pending and without notice to Schlake the parties settled the litigation.

- 2 -

Schlake filed his claim for lien in these proceedings under the Attorney's Lien Act for fees and expenses. The matter of the claim for fees was heard by the court on February 16, 1959. All parties in interest were present and after evidence was heard the court found that the lien of Theodore H. Schlake was proper and attached the sum of \$1750.00 on deposit with the Clerk of the Circuit Court. Judgment for Schlake for an additional sum of \$889.00 and costs was entered.

Plaintiff's theory is that the Attorney's Lien Act must be strictly construed and Schlake's failure to serve a notice of attorney's lien as required by the Act bars his claim. We point out that there is no report of proceedings so that no question of fact could be determined by us. *Argyle v. Truckers Coal Co.*, 306 Ill. App. 295.

Plaintiff relies on the Attorneys and Counsellors Act, Ill. Rev. Stat. 1959, ch. 13, § 14, which provides in part, as follows:

Attorneys at law shall have a lien upon all claims . . . for a reasonable fee, for the services of such attorneys rendered. . . . To enforce such lien, such attorneys shall serve notice in writing . . . upon the party against whom their clients may have such suits . . . claiming such lien . . . such lien shall attach to any . . . money . . . which may be recovered. . . .

Slayton & Company, Inc. and Hovey E. Slayton, who were the defendants in plaintiff's original suit have not appealed and do not here raise the question of lack of lien notice for attorney's fees. Under Section 14 service of notice

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of attorney's lien upon client is not required. See Eckwall v. Eckwall, 299 Ill. App. 621. The provision of this act for service of notice is for the protection of judgment debtor, and not for the benefit of client. Mid-City Trust & Savings Bank v. City of Chicago, 292 Ill. App. 471.

There is no question here that plaintiff employed Schlake as her counsel. The legislature, in enacting the Attorney's Lien Act, intended to protect attorneys' fees for professional services after service of attorney's lien, against any settlement that might thereafter be made between the parties. McArdle v. Great American Indemnity Co., 314 Ill. App. 455.

In our opinion plaintiff has not shown any reversible error; therefore the judgment and order will be presumed correct. For the reasons stated the judgment and order are affirmed.

AFFIRMED.

MURPHY, P.J. AND KILEY, J. CONCUR.

ABSTRACT ONLY.

47822

MICK DESPOTIDES, doing business
as BEST MILK DAIRY,

Plaintiff-Appellee,

v.

NICK LAZOS,

Defendant-Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

25 I.A.^{2d} 251

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

Pursuant to the warrant of attorney in a promissory note, Nick Despotides, doing business as Best Milk Dairy, procured the entry of a judgment against Nick Lazos for \$3969.35, including interest and attorneys' fees. On motion of the defendant supported by an affidavit the court opened the judgment. Following a trial without a jury, the court confirmed the judgment. Defendant, appealing, contends that there was no obligation for the signing of the note and that under the Negotiable Instruments Act, it is accommodation paper and he is not liable therefor (Ill. Rev. Stat. 1959, Chap. 98, sec. 49.) Plaintiff is in the dairy business. Defendant was a stockholder and executive of Terrace Restaurant, Inc., which conducted a restaurant at 55 West Washington Street, Chicago. The corporation had been purchasing milk from the plaintiff since 1951. In October, 1954, the corporation was indebted to plaintiff in the amount of approximately \$4,000.00. At this time the promissory note in suit, dated October 15, 1954,

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-2-

for \$3,000.00, payable to the order of plaintiff 90 days after date, with interest at 6% after date, and signed "Terrace Restaurant, Inc., by Nick Lazos, Pres." and by "Nick Lazos", was delivered to plaintiff.

Subsequently the corporation was adjudicated a bankrupt.

In the schedule filed in the bankruptcy court plaintiff was listed as a creditor. Defendant contends that he attached his individual signature on the note for the sole accomodation of the plaintiff without consideration. There was a conflict in the testimony as to whether the plaintiff dealt with the defendant as a representative of the corporation or as an individual. Plaintiff does not sue the defendant for dairy products sold to him. He sues on the note. The note, which was prepared by the attorney for the plaintiff, recognizes one of the makers thereof as a corporation. There was also a dispute in the testimony as to when the defendant signed the note as an individual. He said that the note was first signed by him as the president of the corporation and that a few days thereafter plaintiff induced him to place his individual signature thereon, telling the defendant that a bank which was to take the note and give the plaintiff credit therefor insisted on the addition of defendant's individual signature. Plaintiff testified that the individual signature was placed on the note at the same time that defendant signed as president of the corporation. The defendant had a substantial stock interest in the corporation. There was consideration for the note in that

-3-

the corporation received further credit and also an extension of time in which to pay the principal amount of the note. The individual signature of the defendant was not for the sole accomodation of the plaintiff. When testimony is contradictory it is well established that in a trial without a jury the determination of the credibility of the witnesses and the weight to be given their testimony are matters for the trial court, and its findings will not be disturbed unless they are manifestly against the weight of the evidence. Eleopoulos v. City of Chicago, 3 Ill.2d 247. We cannot say that the judgment is manifestly against the weight of the evidence. Therefore the judgment is affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., CONCUR.

47874

IDA RICH,

Plaintiff,

v.

BERNARD RICH, et al.,

Defendants.

ANNA WITKOV, et al.,

Counter-Plaintiffs-Appellees,

v.

IDA RICH, et al.,

Counter-Defendants-Appellees

On Appeal of

MAURICE J. SHEROW,

Intervenor-Petitioner-Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

25 I.A.²⁴ 252

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

A complaint was filed by one of the beneficiaries under a testamentary trust seeking the construction of certain provisions thereof relating to the accumulation or distribution of principal and interest and to the vested or contingent nature of the estates created therein. The testamentary trustees and others filed a counterclaim praying for construction of certain other provisions of the trust, including a provision relating to the authority of the testamentary trustees to enter into and consummate a contract for the exchange of certain assets of the trust estate consisting of beneficial interests in

several land trusts holding title to real estate, which contract the testamentary trustees had theretofore made with Maurice J. Sherow and others. Before any issue raised by the complaint or counterclaim was heard or determined, and before the case was set for trial, Sherow attempted to intervene as a party with respect to the counterclaim. The chancellor denied the petition to intervene and struck the petition. Sherow appealed. The appellees have not appeared or filed a brief.

Because of the filing of the original complaint for construction of the testamentary trust, the trustees preferred not to consummate the exchange agreement until the will construction suit had been determined. Thereupon Sherow filed his complaint for specific performance of the agreement, naming as defendants the testamentary trustees and others, which suit was pending and not at issue at the time of the filing of the petition for leave to intervene. Sherow has a direct interest in the question of the authority of the testamentary trustees to make the exchanges which they contracted to make with him. The trustees have by their counterclaim made the validity of the agreement for the exchanges an issue to be determined by the court. This is the same agreement as to which Sherow seeks specific performance against the trustees.

Sherow has an interest in the agreement which the trustees have directly brought into the litigation. He has a real economic stake in the outcome of the litigation. Representa-

-3-

tion of his interests by the testamentary trustees may be inadequate since they and he are no longer striving to reach the same objective. Sherow's petition was filed in due time. In our opinion he had a right to intervene under Sec. 26.1 of the Civil Practice Act which provides that when upon timely application anyone shall be permitted as of right to intervene in an action when the representation of the applicant's interest by existing parties is or may be inadequate, and the applicant will or may be bound by a judgment, decree or order in the action.

Therefore the order of June 16, 1959 is reversed and the cause is remanded with directions to permit Maurice J. Sherow to intervene.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BRYANT, P. J., and FRIEND, J., CONCUR.

47856

RUTH ANDERSON,

Appellee,

v.

MARSHALL FIELD & COMPANY,
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

251A^{2d} 253

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, a customer in defendant's department store, brought suit to recover damages for personal injuries alleged to have been caused by defendant's negligence in maintaining a display of yard goods. Trial by jury resulted in a verdict and judgment in favor of plaintiff for \$4800.00, from which defendant appeals.

The salient facts disclose that on a Saturday in October of 1950 plaintiff, a resident of Berwyn, Illinois, accompanied her neighbor, Mrs. Mildred Boling, on a shopping tour to the Loop in Chicago. After having luncheon in defendant's store, they proceeded to the second-floor yard-goods section, where Mrs. Boling selected some material. Within three or four feet of the counter at which Mrs. Boling was being waited on was a display table featuring woolen yard goods. The materials on display were fifty-four inches in width and, after being doubled, were wrapped around wooden cores measuring approximately twenty-

seven by twelve inches. Some of the bolts of material were standing upright, "packed solid," on the table; others were placed in a horizontal position. While waiting for the sales transaction to be completed, plaintiff was standing by a counter and "just looking"; suddenly she became aware of a pain in her left leg. On looking down, she saw a bolt of material on her foot; she did not see it as it was falling or as it struck her. A floorman came over immediately to assist her and, in the course of conversation with her, hazarded the guess that someone passing by might have knocked the bolt from the table. There was no witness who was able to testify as to what caused the bolt to fall, and there is no evidence that anyone bumped into the display. Immediately following the accident, plaintiff, accompanied by Mrs. Boling, was taken to a first-aid room, where applications were applied for about a half hour. Both women walked downstairs and returned home. Plaintiff received no other medical treatment until two days later, a Monday, when she was examined by Dr. Gil Ehlers, who diagnosed the injury as abrasions, a hematoma, and a sprained left ankle; there was no evidence of fracture. Dr. Ehlers attended plaintiff over a period of time and prescribed diathermy treatment. At the time of the trial, over eight years after the accident, plaintiff stated that she still experienced some pain. No question is raised as to the amount of the verdict and judgment.

Plaintiff's statement of claim charged defendant with committing one or more of the following negligent acts:

- (a) carelessly allowing a bolt of yard goods to fall on plaintiff from a counter;
- (b) carelessly operating or maintaining a yard-goods counter or display;
- (c) carelessly operating or maintaining a yard-goods display causing a bolt of yard goods to fall, injuring plaintiff;
- (d) carelessly permitting bolts of yard goods to be placed on end on a counter or display; and
- (e) carelessly permitting bolts of material to stand on end at the counter or display table having plywood or other material at the end of the bolts of material.

It is urged that the court erred in submitting the case to the jury on the ground that plaintiff failed to sustain her burden of proving negligence on the part of defendant, and to establish freedom from contributory negligence on her part. Plaintiff, on the other hand, relies on the allegations of the complaint that the proximate cause of the accident was the negligent piling of the material on the table, and asserts that defendant is liable for insecurely piling the bolts on the table, whether the bolt fell of itself or through the independent act of a customer who may have knocked it from the table.

The principal question presented is whether plaintiff's allegations of negligence were so general as to afford a basis

for the application of the doctrine of res ipsa loquitur. Her counsel argue that since no specific negligence was charged, nor any evidence adduced tending to prove specific allegations of negligence, a verdict and judgment on the theory of res ipsa loquitur were justified. The rule is well settled that the doctrine is applicable only when general negligence is pleaded; a presumption or inference of negligence then arises which is not absolute or conclusive but is rebuttable, and vanishes entirely when any evidence appears to the contrary. *Bollenbach v. Bloomenthal*, 341 Ill. 539. As we read the five allegations of negligence charged in the complaint, they were not charges setting out specific negligence but were charges couched in general terms. *Blade v. Site of Ft. Dearborn Bldg. Corp.*, 245 Ill. App. 484, and *Welter v. Bowman Dairy Co.*, 318 Ill. App. 305, citing and discussing a number of cases, support this conclusion. In the *Blade* case the court held that the charge of negligence was sufficiently general to state a cause of presumptive negligence within the doctrine of res ipsa loquitur if the instrumentality or scaffolding was under the control of the defendants against whom the judgment was entered. In the *Welter* case the complaint charged that defendant placed and allowed an impure substance to remain in a bottle of milk, that defendant failed to inspect the bottle, failed to warn of the danger of using the milk, and violated a section of the Pure Food Act. It was there held that these charges

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were phrased in general terms and were not specific in nature. Where general negligence is charged, the plaintiff is not required to adduce evidence of specific negligence but to prove only that an accident occurred, without contributory negligence on his part, as the result of which injuries were sustained; the burden is then placed on defendant to meet the presumption or inference of negligence raised by the application of the doctrine of res ipsa loquitur. In the case at bar, defendant offered no rebuttal whatever, nor was there any evidence proving or tending to prove that plaintiff was contributorily negligent. Under the circumstances the jury was justified in returning a verdict in favor of plaintiff, and, accordingly, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P. J., and BURKE, J., CONCUR.

IN THE
APPELLATE COURT OF ILLINOIS
- - -

FOURTH DISTRICT
- - -

February Term, A. D. 1960.

WILL STACEY GREER,)
Appellant,)
VS.)
HENRY CROOM, d/b/a B & M)
SERVICE STATION,)
Appellee.)
Appeal from the
City Court of the
City of East St.
Louis, Illinois.

Honorable Joseph A. Troy, Trial Judge.

HOFFMAN, JUSTICE

25 I.A.^{2d} 254

This is an appeal by plaintiff from an order approving a jury's verdict in favor of defendant in a suit brought to recover for personal injuries.

A building in East St. Louis, which consisted of a filling station and a garage, was leased by its owner as follows: the filling station to the defendant and the garage to one Patterson. In the employ of Patterson was a mechanic named Morrison. On the day in question, plaintiff drove his car up to the building to have his spark plugs changed and to have the carburetor adjusted. Plaintiff asked defendant to do this work for him but was told that he was too busy and plaintiff "should find one of the boys" to do the job. Plaintiff, seeing Morrison standing nearby, asked him to do this work. Morrison installed the plugs and then, in order to adjust the carburetor, asked

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plaintiff to start the engine. This the plaintiff did. He then left the motor running, with the gears in neutral, and got out of the car. Morrison, working under the hood, raced the motor several times as he worked on the carburetor. On one of these occasions, for some unexplained reason, the car lunged forward and pinned plaintiff, who was standing in front of the car, against the wall. It is for the injuries which ensued that plaintiff seeks to recover.

The plaintiff brought suit against the defendant on the theory that either Morrison was actually the defendant's agent or that defendant held him out to be his agent. On appeal, it is claimed by the plaintiff that the verdict is contrary to the manifest weight of the evidence and that the trial court improperly instructed the jury on the law of the case.

To recover, it was necessary for plaintiff to prove, among other things, Morrison's negligence, and his, plaintiff's freedom from contributory negligence. The facts disclose that Morrison was doing mechanical work under the hood on plaintiff's car at the time of the injury. The engine had been started by plaintiff, and the gears placed in neutral. He then slid across the front seat and got out of the car on the right side. He stood in front of the car, between it and the building, while Morrison worked on the carburetor and raced the motor. It was never shown what caused the car to lurch forward. There is no proof that Morrison caused this; in fact, it is difficult for us, and we presume it was for the jury, to conclude that Morrison was at fault. If the transmission of the car was defective, there is no proof that Morrison had knowledge of this.

Whenever it is contended that a verdict is against the

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manifest weight of the evidence, it is immaterial whether we agree or disagree with the jury's result. A court of review can set aside a verdict as being against the manifest weight of the evidence only when it is obvious or clearly evident that the jurors have arrived at an incorrect result. *Romines v. Illinois Motor Freight, Incorporated*, 21 Ill. App. 2d 380, 158 N. E. 2d 97. We have carefully reviewed the entire record and find no indication that a conclusion opposite to the jury's was clearly evident. We cannot say that the verdict in favor of defendant was contrary to the manifest weight of the evidence. The plaintiff stated in his brief that "the negligence of Morrison and the possibility of contributory negligence on the part of plaintiff were questions for a jury to decide." We agree.

Plaintiff has also included in his brief and argument a claim that the trial court erred in refusing to instruct the jury concerning his theory of the case, especially his position that the defendant was liable for Morrison's negligence based on apparent agency.

The record fails to show a conference on instructions, and nowhere does it appear what objections, if any, the plaintiff made in the trial court to any of the defendant's given instructions. Even in his post-trial motion, he failed to specify the instructions of the defendant about which he now complains. We, therefore, cannot now consider the present objections he makes to certain of the instructions given on behalf of the defendant. *Amanda v. Suits*, 8 Ill. 2d 598, 604, 134 N.E. 2d 811, 813; *Saunders v. Schultz*, 22 Ill. App. 2d 402, 161 N. E. 2d 129, 134.

Plaintiff's post-trial motion did, however, set forth specifically, two instructions of the plaintiff which had been refused

by the trial court. We, therefore, have considered them on this appeal. As applied to this case, we find no reversible error in the trial court's refusal to give the two instructions plaintiff tendered.

We have examined the whole record and find no substantial error. In our judgment, the evidence supports the verdict and the judgment should be affirmed.

Judgment affirmed.

Scheineman, P. J., and Culbertson, J., concur.

Not to be published in full.

APR 8 1960
James P. [Signature]
CLERK OF THE DISTRICT COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10287

Agenda No. 12

Adolph Hulcher and Austin W. Hulcher,
d/b/a Adolph Hulcher & Son,

Plaintiffs-Appellees,

vs.

C. C. Adcock and Clarence F. Steckel,

Defendants.

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Clarence F. Steckel,

Defendant-Appellant.

Appeal from the
Circuit Court of
Greene County

25 LA. 255^{2d}

REYNOLDS, P.J.

On February 22, 1954, Clarence F. Steckel, defendant herein, entered into an agreement with C. C. Adcock, to bulldoze, burn, level, reclaim and clear up waste lands of Steckel in Greene County, Illinois, for the sum of \$10,000. The agreement was in writing and in detail, specifying the work to be done and the amount to be paid for each item. One of the items of work to be done by Adcock was identified as Item No. 7 of Section II of the contract, which provides for "clearing and burning brush and waste on sixty acres - \$4800.00, (\$4000.00 to be paid when finished and \$800.00 balance

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Agenda No. 12

General No. 10287

Adolph Mulcher and Austin W. Mulcher,
d/p/a Adolph Mulcher & Son,

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Defendants.

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Clarence F. Steckel,

Defendant-Appellant.

Appeal from the
Circuit Court of
Greene County

221A.252

FILED IN CASE NO. 10287, GENERAL NO. 10287, AGENDA NO. 12, STATE OF ILLINOIS, APPELLATE COURT, THIRD DISTRICT, JANUARY 12, 1934.

REYNOLDS, P. J.

On February 22, 1934, Clarence F. Steckel, defendant herein,

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level, reclaim and clear up waste lands of Steckel in Greene County,

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and in detail, specifying the work to be done and the amount to be

paid for each item. One of the items of work to be done by Adcock

was identified as item No. 7 of Section II of the contract, which

provides for "clearing and burning brush and waste on sixty acres -

\$4800.00, (\$4000.00 to be paid when finished and \$800.00 balance

paid when contract is fulfilled.)" So far as this case is concerned, Adcock did no work in connection with this Item No. 7 of the contract, but on March 23, 1954, he entered into a sub-contract with Adolph E. Hulcher & Son of Virden, Illinois, the plaintiffs herein, for them to clear out the tract of timber owned by C. F. Steckel, located on Macoupin Creek south of Carrollton, consisting of 40 acres (approximately) between Dry Branch and Macoupin Creek. The timber was to be taken out and piled suitable for burning, spoil banks were to be shaped down suitable for farming and all large trees or stumps were to be sawed off at top of ground by Adcock. The agreed price of the sub-contract was \$4000.00 to be paid when finished.

About the latter part of March 1954, the Hulchers moved their equipment to the Steckel farm and started to work. Either the first day, or the next, Steckel showed up and talked to Austin Hulcher, one of the plaintiffs. Steckel was surprised and told Austin Hulcher about the written contract between himself and Adcock. Later that same day, about 7:30 p.m. the two Hulchers, Austin and his father Adolph, one of their bulldozer operators, Harry Starks, C. C. Adcock and Steckel met at Steckel's home and discussed the contract and the work for some one and one half to two hours. The two

March

This report was prepared in accordance with the instructions of the
Committee, and it is hoped that it will be of some assistance to the
Committee in its work. The following is a summary of the information
received from the various sources mentioned in the report. The information
is given in the order in which it was received, and it is not intended
to be a complete statement of the facts, but rather a summary of the
information received from the various sources mentioned in the report.
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to be a complete statement of the facts, but rather a summary of the
information received from the various sources mentioned in the report.

Hulchers testified and they were corroborated in this by Starks, that they entered into an oral agreement with Steckel to do the work of clearing the land at the rate of \$100.00 per acre. Adcock was present but he testified he heard nothing said about payment to the Hulchers of \$100.00 per acre, but that there was an agreement then that the Hulchers were to take over that part of the contract between Dry Branch and Macoupin Creek and that Adcock was to be let out of that part of the contract. Further, that he, Adcock was to burn the brush after it had been cut and piled, for \$800.00. Steckel denied any agreement with the Hulchers to pay them \$100.00 per acre to clear the land, but said that he told the Hulchers he did not care for them going ahead and doing the work, provided they did it in line with the original contract with Adcock. Using his language, he testified he told the Hulchers, "If you want to go ahead, sixty acres at \$80.00 an acre, you go ahead and do an acceptable job, and I will pay you the money the same as I would pay Mr. Adcock. On the other hand, if you don't feel satisfied, now is the time to say so. You have put in part of two days on the job, and if you are not satisfied to follow this written contract as it is you would not hurt my feeling if you take your outfit and go home and forget about the rest of it." He stated that the Hulchers decided as long as they had their equipment down

Hulshers testified that they were accompanied in this by others, that they entered into an oral agreement with Adcock to do the work of clearing the land at the rate of \$100.00 per acre. Adcock was present but he testified he heard nothing said about payment to the Hulshers at \$100.00 per acre, but that there was an agreement that the Hulshers were to take over that part of the contract between the Hulshers and Adcock. Further, that he was to be let out of that part of the contract. Further, that he, Adcock, was to have the price after it had been cut and piled, for \$600.00. Adcock denied any agreement with the Hulshers to pay them \$100.00 per acre to clear the land, but said that he told the Hulshers he did not care for their going ahead and doing the work, provided they did it in line with the original contract with Adcock. Using his language, he testified he told the Hulshers, "If you want to do that, sixty acres at \$100.00 an acre, you go ahead and do an accounting job, and I will pay you the money for the same as I would pay Mr. Adcock. On the other hand, if you don't feel satisfied, now is the time to say so. You have got in part of two days on the job, and if you are not satisfied to follow the written contract as it is you would not have any feeling if you take your outfit and go home and forget about the rest of it." He stated that the Hulshers decided as long as they had their equipment down

there and hated to pull out, they would go ahead and continue the work.

There is a dispute in the evidence as to the acreage cleared. The defendant claims that 15 acres was cleared before the work started and that the total acreage was 58 acres, including the cleared land. The plaintiffs put in evidence a plat made by a land surveyor showing the land cleared to be 79.9 acres.

The defendant Steckel paid the Hulchers a total sum of \$2500.00 and offered them a final payment of \$700.00 which was refused. The first check, payable to A. E. Hulcher and Son, in the amount of \$1600.00 was paid while the work was in progress. The second check, \$900.00 was also paid during the progress of the work and was made out to Adolph Hulcher and Son. Neither of these checks bore the name of C. C. Adcock, but the final payment offered, a check for \$700.00 was to the Hulchers and Adcock. Before the defendant would pay the Hulchers, he insisted upon an assignment from Adcock (Defendant's Exhibit No. 4) authorizing a payment of not to exceed \$2500.00 by Steckel to the Hulchers.

There is an error in the amount claimed to have been paid, the evidence showing that \$2500.00 was paid, but the plaintiffs in their complaint allege that they received \$2400.00. Basing their claim upon 79.9 acres cleared, at the rate of \$100.00 per acre, the

there and before we will say, they would go ahead and continue the work.

There is a dispute in the evidence as to the acreage cleared. The defendant claims that 12 acres was cleared before the work started and that the total acreage was 55 acres, including the cleared land. The plaintiff put in evidence a plat made by a land surveyor showing the land cleared to be 79.9 acres.

The defendant testified that the plaintiff's total was of \$2500.00 and offered them a final payment of \$700.00 which was refused. The first check, payable to A. B. Mulcher and Son, in the amount of \$1600.00 was paid while the work was in progress. The second check, \$900.00 was also paid during the progress of the work and was made out to Adolph Mulcher and Son. Neither of these checks bore the name of C. C. Adcock, but the final payment offered, a check for \$700.00 was to the Mulchers and Adcock. Before the defendant would pay the Mulchers, he insisted upon an assignment from Adcock (Defendant's Exhibit No. 4) authorizing a payment of not to exceed \$2500.00 by Adcock to the Mulchers.

There is an error in the amount claimed to have been paid, the evidence showing that \$2500.00 was paid, but the plaintiff in their complaint allege that they received \$2400.00. Barring their claim upon 79.9 acres cleared, at the rate of \$100.00 per acre, the

Hulchers claimed a balance of \$5590.00 due them, but using their own claim of \$100.00 per acre for computation, they would only be entitled to a balance of \$5490.00. Suit was brought in two counts, Count I being against Adcock, and Count II being against Steckel, each count claiming \$5590.00 to be due the plaintiffs.

The defendant Steckel claimed that the Hulchers failed to carry out the agreement as to clearing the land, removing of stumps and burning the brush, and introduced testimony to show that he paid Jones Construction Company \$1600.00 to burn the trees and wood in the windrows and \$200.00 to remove stumps found under the windrows. Lester Patton, an employee of Steckel and of the Jones Construction Company testified he removed the stumps and burned the brush and that Steckel paid him \$1600.00 and a \$200.00 bonus. This witness was rather vague but believed those were the amounts.

Adcock, after the conference at Steckel's home did nothing further as to the land being cleared by the Hulchers. He admitted he was to burn the brush after they, the Hulchers cut it, for \$800.00, but said that the Hulchers said they would take the logs and would just as soon go ahead and burn the brush for the \$800.00. He admitted he did not remove the brush, nor burn it, and did not remove the logs. He claimed that he did all the work he was to do on the Steckel farm except that part sublet or assigned to the Hulchers. He did not receive any part of the \$2500.00 paid to the

Hitchers claimed a balance of \$5880.00 due them, but when their own claim of \$100.00 per acre for compensation, they would only be entitled to a balance of \$5780.00. This was brought in two counts, Count I being against Hancock, and Count II being against Hancock, each count claiming \$5780.00 to be due the plaintiffs.

The defendant then claimed that the plaintiffs failed to carry out the agreement as to clearing the land, removing of stumps and burning the brush, and introduced testimony to show that he paid Jones Construction Company \$1500.00 to burn the brush and wood in the windows and \$100.00 to remove stumps from under the windows. Lester Patton, an employee of Patton and of the Jones Construction Company testified he removed the stumps and burned the brush and that the total paid him \$1500.00 and a \$100.00 bonus. This witness was either never interviewed or the interview was not reported, after the conference at which the plaintiffs had nothing further to do with being allowed by the plaintiffs. He admitted he was to burn the brush after they, the plaintiffs, cut it, for \$800.00, but said that the plaintiffs said they would take the logs and would just as soon go ahead and burn the brush for the \$800.00. He admitted he did not remove the brush, nor burn it, and did not remove the logs. He claimed that he did all the work he was to do on the St. Paul farm except that part which was assigned to the plaintiffs. He did not receive any part of the \$1500.00 paid to the

Hulchers, and no part was ever offered to him. He knew the money was paid by Steckel to the Hulchers.

On motion by defendant Steckel that the plaintiffs be required to elect which count of the complaint they desired to proceed under, the motion was allowed and the plaintiffs elected to proceed under Count II of the complaint, the count against Steckel. Adcock was dismissed from the suit. The jury found the issues for the plaintiffs and against the defendant and assessed damages at \$2500.00. Judgment was entered on the verdict of the jury, and from that judgment the defendant appeals to this court.

The appeal is based upon the contention that the court should have directed a verdict for the defendant, on the theory that the plaintiffs did not offer any evidence of a contract with defendant to clear 79.9 acres of land, and that the verdict is manifestly against the weight of the evidence and that the amount arrived at cannot be explained upon any theory of the evidence.

A directed verdict is not proper where there is in the record any evidence which, standing alone and taken with all its inferences most favorable to the party resisting the motion, tends to prove the material elements of his case. Romines v. Illinois Motor Freight Inc., 21 Ill. App. 2d 380; Lindroth v. Walgreen Co. 407 Ill. 121; Mitchell v. Van Scoyk, 1 Ill. 2d 160; Tidholm v. Tidholm,

Michigan, and no part was ever returned to him, and the

money was paid by check to the plaintiff.

In action by defendant against the plaintiff to

recover the amount of the sum of \$100.00, the plaintiff

pleaded that the money was never paid to him, and that

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391 Ill. 19; Parrucci v. Kruse, 12 Ill. App. 2d 30. The evidence here shows that Steckel and Adcock entered into a written agreement for Adcock to do certain work on the Steckel farm for the sum of \$10,000.00. Without consulting Steckel, Adcock entered into a verbal agreement with the Hulchers for them to do that part of the work covered by Item No. 7 of Section II of the contract. This part of the written agreement between Steckel and Adcock covered the clearing, bulldozing and burning of the brush on a tract described as that land lying between Dry Branch and Macoupin Creek. In the written agreement Adcock was to receive \$4000.00 for the work. Acting under this verbal agreement with Adcock, the Hulchers went upon the Steckel farm and started to work, sometime in the latter part of March 1954. Steckel's son saw the Hulchers at work on the farm and reported it to his father and Steckel went to the place where the Hulchers were working and talked with Austin Hulcher. Apparently this is the first time Steckel knew the Hulchers were working under an agreement with Adcock and apparently it is also the first time the Hulchers knew of the written agreement. After some conversation there on the field, a meeting was held that night at the home of Steckel. Whether this meeting was by agreement or not is disputed, but it is undisputed that the two Hulchers, Adolph and his son Austin, their bulldozer operator Sparks, Adcock and Steckel

301 III. 1st; Partridge v. Stone, 12 Ill. App. 2d 351. The evidence here shows that Stetson and Stone entered into a written agreement for Stetson to do certain work on the Island for the sum of \$10,000.00. Without consulting Stetson, Stone entered into a verbal agreement with the Island for them to do that part of the work covered by Item No. 7 of Section II of the contract. This part of the written agreement between Stetson and Stone, covering the clearing, grubbing and burning of the land on the Island, is set forth in the first paragraph of the contract and is incorporated by reference in the written agreement between Stetson and Stone for the work. During the time this verbal agreement was made, the Island went upon the Island and started to work, according to the letter of March 1954. Stetson's son saw the Island at work on the land and reported it to his father and Stetson went to the place where the Island was working and talked with Austin Bullock. Apparently this is the first time Stetson knew the Island was working under an agreement with the Island and apparently it is also the first time the Island knew of the written agreement. After some conversation there on the Island, a meeting was held that night at the home of Stetson. Whether this meeting was an agreement or not is charged, but it is undisputed that the two brothers, Stetson and his son Austin, with Bullock, operator of the Island, and Stetson

were present at this meeting and that it lasted from one and one half to two hours. The Hulchers and Sparks claimed that it was agreed at this meeting that the Hulchers would do the work on this part of the farm for \$100.00 per acre, but this is disputed by Steckel who claimed that he offered them \$80.00 per acre. Adcock who was present testified he heard nothing about the \$100.00 per acre agreement. Steckel claimed that after he had shown the Hulchers the written contract with Adcock, he told them he did not care for them going ahead and doing the work, provided they did it in line with the original contract with Adcock. He testified that he told them "If you want to go ahead, sixty acres at \$80.00 an acre, you go ahead and do an acceptable job and I will pay you the money the same as I would pay Mr. Adcock." He further testified that after some discussion, the Hulchers decided to go ahead with the work. There is no dispute that the Hulchers put three bulldozers at work in the field and worked approximately two months in clearing and grading the land. It is disputed as to the acreage cleared. The Hulchers had a land surveyor make up a plat of the land to show that they cleared 79.9 acres. The owner, Steckel, claimed it was 58 to 60 acres. The payment of the two checks totaling \$2500.00 is not disputed and these two checks were made out to the Hulchers. From Adcock's testimony it is also clear that he

were present at this meeting and that it lasted from one and one half to two hours. The Mulchens and Sparks claimed that it was agreed at this meeting that the Mulchens would do the work on this part of the farm for \$100.00 per acre, but this is disputed by Stachel who claimed that he offered them \$50.00 per acre. Mulchens who was present testified he heard nothing about the \$100.00 per acre agreement. Stachel claimed that after he had shown the Mulchens the written contract with Stachel, he told them he did not care for them going ahead and doing the work, provided they did it in line with the original contract with Stachel. He testified that he told them "If you want to go ahead, sixty acres at \$50.00 an acre, you go ahead and do an acceptable job and I will pay you the money the same as I would pay Mr. Stachel." He further testified that after some discussion, the Mulchens decided to go ahead with the work. There is no dispute that the Mulchens put three hundred acres at work in the field and worked approximately two months in clearing and grading the land. It is disputed as to the acreage cleared. The Mulchens had a land surveyor make up a plan of the land to show that they cleared 77.9 acres. The owner, Stachel, claimed it was 58 to 60 acres. The payment of the two checks totaling \$3500.00 is not disputed and these two checks were made out to the Mulchens. From Stachel's testimony it is also clear that he

claimed no interest in the money due for the work done by the Hulchers. There was some agreement that after the work was done, Adcock was to burn the brush, but he testified that the Hulchers said they wanted the wood and they would do the burning. So far as this particular tract was concerned, after the conference at the home of Steckel the latter part of March 1954, Adcock took no further action in any way, claimed no interest in the work or the money due for the work, and except for making the assignment at the request of Steckel for \$2500.00 (Defendant's Exhibit No. 4) did nothing further. Just why this assignment was made is not clear, but apparently it was a precaution on the part of Steckel.

These facts present a factual question for the jury, so that the trial court was correct in not directing a verdict for the defendant Steckel. While there was a written contract for the work, and there was no positive action on the part of anyone to rescind or revoke this agreement, it is clear that there was a verbal agreement entered into at the home of Steckel, all interested parties being present, whereby the Hulchers with the consent of Adcock, took over that part of the written contract between Adcock and Steckel covered by Item M. 7 of Section II. The right of the parties to modify by mutual agreement a written agreement seems unquestioned. After an agreement has been reduced to writing, in cases falling within the

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the home of Haddock the latter gave a check for \$250.00, Haddock took no
further action in any way, claimed no interest in the work or the
money due for the work, and except for making the assignment of the
request of Haddock for \$250.00 (Defendant's Exhibit No. 1) did
nothing further. That why this assignment was made is not clear, and
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by Item 1. 7 of Section II. The right of the parties to modify by
mutual agreement a written agreement seems unquestioned. After an
agreement has been reduced to writing, in case of a falling within the

general rules of the common law, parties may, at any time before breach of the agreement, by a new contract not in writing, either altogether waive, dissolve, or annul the former agreement, or in any manner add to, or subtract from, or vary or qualify terms thereof, and thus make a new contract. Robison v. Hardy, 22 Ill. App. 512; McMillan for Use of, v. De Tamble, 93 Ill. App. 65; Commercial Car Line v. Anderson, 224 Ill. App. 187; Fitzu v. Levin, 339 Ill. App. 391; Mid-State Products Co. v. Commodity Credit Corp., 196 F. 2d 416. One party may not modify the terms of a written agreement, but the modification or change must be by mutual agreement of the parties. Ellman v. Ianni, 21 Ill. App. 2d 353. And, when the contract is amended or modified by a subsequent agreement, suit must be brought on the modified agreement and not on the original agreement. Noll Co. v. Sparks Milling Co., 304 Ill. App. 624; Cooltronic Corp. of America v. Lieb Bros. Inc., 18 Ill. App. 2d 544. There is no sanctity to a written agreement that would prevent the parties themselves, by mutual agreement, from altering, changing, modifying, taking in new parties, or otherwise. They might, if they so desired, tear the agreement up and so long as it is executory, any rights thereunder would be abrogated. Here, in this case, the parties themselves, Steckel and Adcock, agreed to a modification of the written agreement between themselves, by sub-

general rules or the common law, parties may, at the time of the breach of the agreement, by a new contract not in writing, either altogether revive, modify, or amend the former agreement, or in any manner add to, or subtract from, or vary or qualify the terms thereof, and thus make a new contract. Robinson v. Harvey, 22 Ill. App. 311; McMillan for use of v. De Lande, 93 Ill. App. 88; Commercial Guaranty v. Anderson, 224 Ill. App. 117; Litke v. Davis, 225 Ill. App. 241; Mid-State Products Co. v. Goody Credit Corp., 196 L. Ed. 2d 210. One party may not modify the terms of a written agreement, but the modification or change must be by mutual agreement of the parties. Wright v. Tarrant, 21 Ill. App. 23 223. And, when the contract is amended or modified by a subsequent agreement, said must be brought on the modified agreement and not on the original agreement. Hall Co. v. Morris, 111 Ill. App. 301; Goofin's Corp. of America v. First Nat. Bank, Inc., 18 Ill. App. 24 241. There is no necessity to a written agreement that would prevent the parties themselves, by verbal agreement, from altering, changing, modifying, adding in new parties, or otherwise. They might, if they so desired, tear the agreement up and so long as it is executory, any rights thereunder would be extinguished. Here, in this case, the parties themselves, Stetson and Abcock, agreed to a modification of the written agreement between themselves, by and

stituting Hulcher and Son as to a portion of the work done. While it was a verbal agreement, it had the effect of modifying the original written agreement to that extent.

There can be no quarrel with the cases cited by the defendant in support of its contention that where there is a total failure to prove one or more essential elements of the case, a directed verdict should be allowed. Tucker v. N.Y.C. & St. L.R.R. Co., 12 Ill. 2d 532; Hamilton Co. v. Channell Chemical Co., 327 Ill. 362; Lowenstern Bros. v. Marks Credit Clothing, 319 Ill. App. 71. But a consideration of the evidence here fails to show such a situation. It is true that there was a dispute as to the amount to be paid per acre for the work, and as to the acreage cleared. There is a dispute as to whether or not the work was done satisfactorily. All these questions however, are questions of fact for the jury to decide and to say that there is no evidence in the record which, standing alone and taken with all its intendments most favorable to the plaintiffs, tends to prove the material elements of their case, would be to ignore their testimony and that of the bulldozer operator Sparks, that there was an agreement for them to receive \$100.00 per acre for the land cleared. It would also ignore the testimony of the defendant that he agreed for them to do the work for \$80.00 per acre. It would give no credence to the testimony that they, the Hulchers

did work on this particular job for two months. It would disregard the testimony in the record that Adcock did nothing further as to this part of his written contract with Steckel, and that all further dealings as to this particular work was between Steckel and the two Hulchers. If the defendant Steckel had continued to hold Adcock to his contract and refused to permit any deviation from it, the situation would be different, but by his own testimony he agreed to the substitution of the Hulchers and except for the assignment by Adcock, treated that part of the written contract as superseded by his verbal agreement with the Hulchers. It is distinctly the province of the jury to arrive at the truth of these questions of fact, and our courts have laid down the general rule that such questions of fact should not be disturbed by a reviewing court unless such verdict is manifestly and palpably against the weight of the evidence. Koch v. Lemmerman, 12 Ill. App. 2d 237; Ashby v. Irish, 2 Ill. App. 2d 9; Hanck v. Ruan Transport Corp. 3 Ill. App. 2d 372. Where the evidence is conflicting the court will not substitute its judgment for that of the jury. Schneiderman v. Interstate Transit Lines, 394 Ill. 569, 583. While the terms of the verbal contract are in dispute, there can be no serious question that there did exist a contract between the defendant and the plaintiffs. The verdict of the jury is not against the manifest weight of the evidence but is

did work on this particular job for two years. It would therefore be the testimony in the record that Adcock had nothing further to do with this part of his written contract with Mulchens, and that all further dealings as to this particular work was between Mulchens and the two Mulchens. If the defendant Adcock had continued to hold Adcock to his contract and refused to permit any deviation from it, the situation would be different, but in his own testimony he agreed to the satisfaction of the jury and exact for the assignment as Adcock, treated that part of the written contract as superseded by his verbal agreement with the Mulchens. It is distinctly the province of the jury to arrive at the truth of these questions of fact, and our courts have laid down the general rule that such questions of fact should not be disturbed by a reviewing court unless there is a manifest error and palpably against the weight of the evidence. Koch v. Leckert, 12 Ill. App. 2d 227; Adcock v. Mulchens, 3 Ill. App. 2d 272; Hank v. Penn Transportation Corp., 3 Ill. App. 2d 272. Where the evidence is conflicting the court will not substitute its judgment for that of the jury. Bohrer v. Interstate Transit Lines, 324 Ill. 509, 583. While the terms of the verbal contract are in dispute, there can be no serious question that there did exist a contract between the defendant and the plaintiff. The verdict of the jury is not against the manifest weight of the evidence and is

supported by the evidence, both for the plaintiffs and by the admissions of the defendant Steckel.

But the defendant complains that the amount of the verdict cannot be explained upon any theory of the evidence. If the verdict of the jury awarding damages was capricious or so clearly in error that it could not be explained, it would have been the duty of the trial court to grant a new trial. However, a court cannot guess what is in the minds of a jury and is not permitted to inquire. Based upon the conflicting testimony here, the jury might have found several sums due and each could have been explained as conforming to some portion of the evidence. It is not the province of this court or the trial court to disturb the amount found due if, upon any reasonable computation it can be sustained. For the reasons stated the judgment should be affirmed.

Judgment affirmed.

CARROLL and ROETH, JJ., concur.

supported by the evidence, both for the plaintiffs and by the admissions of the defendant Jackson.

But the defendant complains that the amount of the verdict cannot be explained upon any theory of the evidence. If the verdict of the jury awarding damages was capricious or so clearly in error that it could not be explained, it would have been the duty of the trial court to grant a new trial. However, a court cannot guess what is in the minds of a jury and is not permitted to inquire. Based upon the conflicting testimony here, the jury might have found several sums and each could have been explained as conforming to some portion of the evidence. It is not the province of this court or the trial court to disturb the amount found due it, upon any reasonable computation it can be sustained. For the reasons stated the judgment should be affirmed.

Judgment affirmed.

CARBOLL and ROETH, JJ., concur.

47914

SYLVIA C. MOORE,

Appellee,

v.

JAMES B. MOORE,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

25 I.A. ^{2d} 255

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This divorce action began as a suit for separate maintenance. During the pendency of defendant's appeal from a separate maintenance temporary alimony allowance, the court awarded plaintiff attorney's fees and court costs for the appeal. Defendant's instant appeal is from that order.

The parties were married November 23, 1957, and commenced to live in Kenilworth, Illinois, in a house purchased with their joint funds. There are no children of the marriage. In February, 1958, plaintiff was hospitalized. In March, 1958, she made two unsuccessful attempts to return to live with defendant in their marital home. In November, 1958, plaintiff re-established herself in the home after defendant had left it.

The suit for separate maintenance was filed on January 12, 1959. On January 26, 1959, and after a hearing on the question of the financial circumstances of both parties, the court awarded plaintiff temporary alimony of \$50 a week. It was to defend this award, and after the filing of the amended complaint for divorce, that the court allowed plaintiff \$1,000 for appeal fees and costs.

The temporary alimony order was affirmed during the pendency of the instant appeal (Moore v. Moore, No. 47775). This disposed of the question of its propriety or correctness, and defendant's contention that the pleadings show plaintiff has no grounds for divorce has no basis for consideration in the instant appeal.

The only question before this court at this time is whether the order of July 21, 1959, awarding appeal fees and costs to plaintiff, was an abuse of discretion and erroneous.

The allowance of solicitor's fees and costs rests largely in the discretion of the trial judge, and an abuse of that discretion is subject to review. The court should not arbitrarily fix the amount, and the order should be based upon the required expenditures for prosecution or defense, as evidenced by pleadings, affidavits or examinations in court. (Barton v. Barton, 323 Ill. App. 357, 361 (1944).) The income of both husband and wife must be taken into consideration, and if the wife's income is insufficient to maintain her and to carry on the litigation, the husband's income should be required to contribute to her income as alimony and to bear the expense of the suit. (Decker v. Decker, 279 Ill. 300, 308 (1917).) She is not required to exhaust her estate in marital litigation. Harding v. Harding, 144 Ill. 588, 601 (1892).

Defendant's principal contention is that at the time of the entry of the order for appeal expenses, there was no competent evidence received by the court to show the financial circumstances of the parties nor of the required appeal costs. The order, in addition to routine recitals, contains the statement, "The court having considered evidence heretofore submitted."

The record before us shows that the order was entered on plaintiff's oral motion after notice to defendant. The motion was heard on June 30, 1959, and defendant's counsel objected to any order without a petition or written motion. The transcript contains a colloquy between the chancellor and both counsel. Reference is made to the January, 1959, evidence of the financial circumstances of the parties, in which both parties testified at length as to their income and property and before the same chancellor. Defendant's annual income in January, 1959, was about \$14,000 before taxes. Plaintiff's January income, of about \$5500, was reduced to about \$4300 annually. No representation was made as to any change or reduction in defendant's income.

Plaintiff's counsel sought \$1500 and estimated the appeal defense required 50 hours of legal work at \$30 per hour. This was not disputed nor was any inquiry made as to its accuracy. Defendant argued that any question of an appeal cost allowance should be reserved until a final hearing on the merits of the case; that plaintiff's financial circumstances did not show a need for such an allowance; and that there was nothing before the chancellor except an oral motion. The court took the matter under advisement and entered the order of July 21, 1959.

In view of the chancellor's experience, and of his personal knowledge of what had transpired before him, we are not convinced that it was improper in this case, on an oral motion, to make an allowance for appeal fees and costs and, as a basis for the award to use the January, 1959, financial testimony, and,

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also, in the absence of a contrary showing, to accept the unquestioned estimate of plaintiff's counsel as to required legal services. Saxon v. Saxon, 20 Ill. App. 2d 478 (1959).

We conclude the award to plaintiff of \$1,000 for appeal fees and costs was not an abuse of discretion or erroneous, and the order of July 21, 1959, is hereby affirmed.

AFFIRMED.

KILEY AND BURMAN, JJ., CONCUR.

ABSTRACT ONLY.

47841

BLANCHE ELIZABETH BURKE,

Plaintiff - Appellant,

v.

ROBERT L. SQUIRE, as Trustee of the
Charles P. Squire Living Trust, et
al., etc.

Defendants - Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

25 I.A.^{2d} 256

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order of the trial court dismissing the cause of action on defendants' motion.

Plaintiff filed her original complaint on December 22, 1958. On motion by defendants this pleading was stricken by the trial court, and plaintiff filed an amended complaint on May 15, 1959. No appeal was taken from the order striking the original complaint. Plaintiff maintains that the "entire record", including the original complaint, is before this court, not just the amended complaint. When the trial court granted the motion to strike, it constituted a striking of the pleading from the files, and the pleading ceased to be part of the record. *Gerbracht v. County of Lake*, 328 Ill. 399; 4A C.J.S. 589 (1957). Pleadings stricken from the files were not included in the design of section 74(2) of the Civil Practice Act, Ill. Rev. Stat., ch. 110, sec. 74(2) (1959), as part of the "trial court record" where no appeal has been taken from the order striking the pleading and where plaintiff, with leave, filed an amended pleading. Cf. Historical and Practice Notes, Ill. Ann. Stat., ch. 110, sec. 198 (Smith-Hurd 1936).

The question before us is whether the amended complaint states a cause of action. The motion to dismiss admits the well pleaded facts in the complaint. *Bush v. Babb*, 23 Ill. App. 2d 285.

Plaintiff and Charles P. Squire were engaged to be married for a number of years prior to his death on March 31, 1958. On October 28, 1956, while Squire was hospitalized, they employed Dr. Caesar Sweitzer to arrange "confidentially" to make the requisite blood tests. At his direction the tests were made, and he assured them that he would observe the "confidential relationship" concerning the tests.

On October 29, 1958, Squire's daughter, Dorothy, and her husband stated in the hospital room that they knew of the intended marriage and would prevent it. Dr. Sweitzer later refused to deliver the certificates to Squire and plaintiff saying that Dorothy requested him to retain them.

Plaintiff alleges in Count I that Dorothy, her husband, Dr. Sweitzer and numerous others, listed as defendants, entered into an "illegal and unlawful and fraudulent conspiracy" to deprive her of her right to marry Squire by preventing her from receiving the records of the blood tests; by preventing her from communicating with Squire in Wesley Memorial Hospital even though plaintiff requested admittance; and by removing Squire to other hospitals and homes where she was barred from seeing or communicating with him. Plaintiff alleges in Count II that this "kidnapping" and "confinement" violated Illinois criminal statutes

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and deprived plaintiff of her right to marry Squire, "as well as her ... one-third interest in the estate of Squire."

Plaintiff, in Count IV, in addition to all previous charges, alleges that during Squire's "confinement", defendants, by undue influence, fraud and coercion, caused Squire to revoke his old will giving her "one-third of his estate", and to make a new will incorporating a trust instrument favoring his children. She prays that the new will and trust be set aside. Finally, in Counts V and VI, after realleging all prior charges, she alleges a conspiracy to deprive her of her rights to Squire's estate and that malice is the gist of this action.

In Counts I and II defendants are charged with preventing the alleged agreement of marriage by holding Squire "incommunicado" against his will. We think Counts I and II do not state a violation of a legal right. In *Brown v. Glickstein*, 347 Ill. App. 486, this court held that no legal right is violated by third parties causing the breach of a contract of marriage because "no such rights exist in an agreement to marry." No act of force or violence was directed against plaintiff in the instant case. There is no allegation that she was defamed or otherwise abused, or that she suffered any of the other recognized torts at the hands of defendants. Consequently, since the law does not recognize her right to recover for the interference with an agreement to marry during the betrothal period, we think the first two counts do not state a cause of action.

In Count IV plaintiff alleges that the will probated after Squire's death was executed by means of fraud, undue influence, coercion, threats and duress by defendants in a conspiracy to divest plaintiff of one-third interest in Squire's residuary estate which she was to receive under a prior will. In *Ryan v. Deneen*, 375 Ill. 452, the Supreme Court held that averments of conclusions in the pleadings were insufficient to state a cause of action for undue influence. Facts which show the testator was deprived of his free agency must be stated to warrant the conclusion. There are no facts stated in the amended complaint to support the conclusion of conspiracy against plaintiff, nor are there facts to substantiate the conclusion of undue influence or fraud.

The complaint is read most strongly against the pleader before judgment or decree. *Cahn v. Edgewater Hospital, Inc.*, 8 Ill. App. 2d 559. On the facts as stated in the complaint we can not say that the chancellor should have drawn an inference of undue influence or fraud. The cases cited by plaintiff are not helpful. In *Zwick v. Catavenis*, 331 Ill. 240, the court said that fraud may be inferred from circumstances surrounding the transaction. But in that case there was evidence that a debtor transferred property to a creditor when both knew the debtor was insolvent. The court held the jury could justifiably infer that the transfer was a fraud on the other creditors. In *Gray v. Solomon*, 338 Ill. 433, a contract was found fraudulent because, from the circumstances surrounding its execution, one could

reasonably conclude that it was executed to avoid specific performance of a prior contract. Similar circumstances were found in *Podolski v. Stone*, 186 Ill. 540, and *Garlick v. Imgruet*, 340 Ill. 136. No such inference can be drawn from the facts stated in the instant complaint. And there is no fiduciary relationship alleged between the beneficiaries and the testator as in *Yung v. Peloquin*, 6 Ill. App. 2d 258.

Counts V and VI, alleging conspiracy to deprive plaintiff of her rights to the estate of Squire and that the conspiracy was maliciously contrived, both fall for the reasons fatal to Count IV.

In Count III, plaintiff realleges all previous charges and further alleges that she gave Squire \$25,000 to purchase, manage and repair for her exclusive benefit, the premises at 834-38 West Diversey Parkway, Chicago, Illinois; that he entered into a trust agreement with Cosmopolitan National Bank of Chicago whereby the real estate was conveyed to the Bank by a deed in trust as trustee for Squire's benefit; that subsequently, prior to his death, Squire devised his purported beneficial interest in the Diversey premises by will through another trust instrument to Squire's son Robert as trustee, with the Bank remaining as trustee of the legal title; and that the Bank and Robert are now asserting legal and beneficial ownership of the premises and have caused a lawsuit to be instituted to oust plaintiff from her occupancy of the premises. She alleges the Bank and Robert hold title in her favor under a constructive

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trust. Defendants claim that since plaintiff alleges no written agreement as a basis for the constructive trust theory in Count III, any oral agreement would be unenforceable as violating the statute of frauds. However, since constructive trusts are created by implication or operation of law, the trusts may be, and often can only be, proved by parol evidence. The statute has no application to the facts pleaded. *Bremer v. Bremer*, 411 Ill. 454.

Fraud or the abuse of a confidential relationship are essential elements of a constructive trust. *Compton v. Compton*, 414 Ill. 149. The Supreme Court in *Anderson v. Lybeck*, 15 Ill. 2d 227, 232, defined a fiduciary relationship in this sense as "a very broad one, and exists in all cases where one reposes trust and confidence in another who thus gains a resulting influence and superiority which has been abused." The facts as pleaded show that plaintiff believed her "fiance" Squire to be in a "more favorable" position to transact the business, and that pursuant to his "employment", she gave him the money with which he purchased the property in trust with the Bank. We think these facts sufficiently allege a fiduciary relationship. It is also true that the mere existence of this relationship is not enough to give rise to a constructive trust, *Jones v. Washington*, 412 Ill. 436, but the allegation that Squire devised his beneficial interest in ^{the} property to his son is a charge of an abuse of that relationship sufficient to fulfill the requisite.

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The foregoing conclusion does not militate against our jurisdiction. The result of our decision will not necessarily be that one party will lose and another gain a freehold. *Brown v. City of Evanston*, 2 Ill. 2d 504. We have jurisdiction.

Plaintiff's claim of a constructive trust is not barred by laches. She does not complain of Squire having taken title to the property in trust with the Bank in 1953. The alleged breach of trust occurred when he transferred his interest in the property to Robert, and Robert and the Bank sought to oust her from the premises. Soon after this development she brought suit.

The trial court properly dismissed plaintiff's Counts I, II, IV, V and VI. It erred in dismissing Count III which we think stated a cause of action. The decree is reversed and the cause remanded with directions to proceed further in accordance with this opinion.

AFFIRMED IN PART; REVERSED
IN PART AND REMANDED WITH
DIRECTIONS.

MURPHY, P.J. AND BURMAN, J. CONCUR.

ABSTRACT ONLY.

MARVIN GERTZ, DAVID STEIN and
LOUIS STEIN.

v.

Defendants-Appellees.

COOK COUNTY

25 I.A.^{2d} 257

This is an appeal from an order of the trial court sustaining defendant's motion for judgment on the pleadings and entering judgment accordingly. Appellant alleges an oral lease agreement with a term of five years, at a specified monthly rental. The question for decision is whether the Statute of Frauds (Ill. Rev. Stat. Chap. 59, sec. 2) is a complete defense to the complaint. It provides:

After appellants' complaint at law was stricken, they filed subsequent amended complaints in equity. The allegations in each of the complaints was substantially the same. The first amended complaint in equity was stricken, but the appellees were

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ordered to answer the second amended complaint, which they did. The court thereafter sustained appellees' motion to dismiss appellants' cause and awarded judgment on the pleadings to appellees. This appeal was then taken.

The facts alleged in the complaint last filed, which differ very little from those contained in the stricken complaints, are in substance as follows:

That plaintiffs are the owners of commercial property and are in the business of leasing stores in such property. That defendants are in the business of selling ready to wear clothing for men and boys at retail and are presently lessees of one of plaintiffs' other stores wherein is conducted a similar business. That because of this relationship, "plaintiffs imposed trust and confidence in defendants." That negotiations were conducted for the rental of the premises in question, which resulted in an oral lease for a specified period at a specified rental. That defendants entered the premises and directed the plaintiffs and the plaintiffs' contractors and agents to put up a wall and make other changes on the premises to conform to defendants' requirements, which resulted in considerable expenditures by plaintiffs. That defendants placed a sign in the window of the premises and publicized in other ways that the store would be their new place of business. That plaintiffs are ready to comply with the terms of the oral agreement, as they have been all along, but that defendants refuse to do so. That the changes made in

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the premises are such as to render the premises unrentable as a whole for the entire period of the lease on reasonable terms, and in order to make the premises rentable on the general market, there would have to be a destruction of the changes made and a restoration of the *staus quo*.

The original complaint filed at law sought recovery of \$20,000.00 as damages for breach of the oral lease by appellees. The first amended complaint in Chancery was also for money damages but added a prayer that the defendants be ordered to place the property in *staus quo*, or the condition it was in before the alleged agreement. The second amended complaint in Chancery prayed for specific performance of the oral lease and such other relief as equity may require.

Appellees filed a motion to strike and dismiss the second amended complaint which was denied and they were ordered to answer the complaint. The answer denies the important parts of the complaint and alleged other facts which are indicated at appropriate points in the discussion which follows.

Assuming that there was an oral agreement, it would be within the statute of frauds unless there is some reason that it is inapplicable. The reason relied upon by appellant is that the oral agreement was partially performed. The three most important things said to constitute partial performance are:

- 1) the changes made in the building; 2) constructive possession by appellee in placing a sign in the window and other publicity

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activity consistent with the agreement; and 3) the inability of appellant to reasonably rent all of the premises in the changed condition.

Changes in the building were to be made subject to the approval of the appellees, which was never received. No specifications or plans were submitted to them. A tendered written lease was rejected by them as not containing the changes called for. No clear connection between those changes and the terms of the alleged agreement can be found in that there was no request by appellees shown. They did not induce appellants to perform the work because appellants knew that a written lease was to be executed with authority for work to be done. The anticipation by one of the parties that he can go ahead with changes, does not create a partial performance of the lease, because the lease had never arisen.

There was no possession or payment of rent in this case and no constructive possession resulted from the placing of the sign in the window of the premises. The alleged inability of the appellants to rent the premises in the changed state imposes no liability upon the appellee because there was no inducement which would amount to a misrepresentation or fraud on the part of the appellees as is required for the imposition of the partial performance doctrine. *Ozier v. Haines*, 411 Ill. 160. *Anastaplo v. Radford*, 14 Ill. 2d 526, 538.

Appellants also contend that they should be allowed to recover on a theory of implied contract for the work furnished

-5-

at appellees' request. The action was for the benefits of the lease agreement. Having held that the anticipation of the appellees' approval of the changes is not a result of the inducement of appellees, we hold that there is no sufficient showing of a request for the work to be done as would give rise to an implied contract to pay for the changes.

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., CONCUR.

1012
47839

GEORGE B. COHEN and HELEN IRENE
COHEN, copartners, doing business
as George and Helen Cohen,

Appellants,

v.

LeROY KRUMWIEDE,

Appellee.

APPEAL FROM

COUNTY COURT

COOK COUNTY

25 I.A.^{2d} 258

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

George and Helen Cohen, father and daughter, copartners in the practice of law, brought suit against LeRoy Krumwiede for a balance of \$400.00 allegedly due for legal services rendered by them for and at the request of defendant. The case was tried by the court without a jury and resulted in a finding and judgment in favor of defendant, from which plaintiffs appeal.

It appears that on the evening of June 17, 1957 Krumwiede telephoned plaintiffs and thereafter came to their home in Elmhurst, where they resided, from Bensenville, where defendant lived, and brought with him one John Bean. Since Bean was intoxicated, Krumwiede did all the talking. He related the following story -- defendant and Bean had been friends in Bensenville for fifteen years; Bean had married and gone to reside in North Carolina with his wife; she returned to Bensenville before her husband and became infatuated with a local police

-2-

officer, whom she intended to marry after obtaining a divorce from Bean, for which she had filed suit. Defendant and his wife took Bean into their home, and Krumwiede obtained a job for him at his place of employment.

Mrs. Bean was threatening the Krumwiedes because they harbored her husband. Bensenville police broke into the Krumwiede home, without warrants, on June 15, 1957, preferring charges against Bean of driving under the influence of liquor, carrying an opened container of liquor in an automobile, and resisting an officer, took him out of the Krumwiede home and arrested him. As a result of the entry into their home, Krumwiede's wife and children became hysterical, and the children had to be sent to reside elsewhere temporarily. Plaintiffs testified that Krumwiede wanted to sue or know what could be done about suing the Village of Bensenville for the wrongful entry of policemen into his home. He also wanted to be released from the bonds which he and his wife had signed for Bean which pledged their \$18,000.00 home as security, and was anxious that all the civil and criminal litigation against Bean be taken care of so that he would no longer be liable on their bond.

Krumwiede told plaintiffs that he had obtained their name from a telephone directory. Apparently he did not wish to consult or retain an attorney residing in Bensenville

-3-

because of some former difficulty with him. After Krumwiede had related the purpose of his business, plaintiff wanted to know who was going to pay and asked defendant, who said that he would pay. Bean was asked what he wanted and replied that he had no desires in the matter. Krumwiede then asked plaintiffs what their services would cost, was given a retainer and contract estimate, and, as plaintiffs testified, he replied, "Go ahead." Plaintiffs agreed to do so. Bean did not in any wise enter into the conversation. Two days later, a check for \$50.00, issued by Mrs. Krumwiede to Bean and endorsed by him, was delivered to plaintiffs.

Subsequently, on July 13, 1957, when the charges against Bean came on for hearing before the Justice of the Peace of Bensenville, George Cohen arranged to have Bean plead guilty and pay fines aggregating \$75.00, and thus relieve Mr. and Mrs. Krumwiede from their obligation on the bond. Plaintiffs also prevailed upon the Bensenville Chief of Police to order officers of the village to desist from annoying defendant or entering his home. There was no denial on trial that plaintiffs had rendered the foregoing services, nor was the reasonableness of their charges questioned. Subsequently Krumwiede refused to pay the balance, for which plaintiffs alleged he had contracted to pay, and they brought suit.

Defendant denied that he employed plaintiffs and testified that they were employed by Bean, who had assumed the obligation to

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-4-

pay them. It is clear from the record that Bean took no part whatever in the conversation that ensued on the evening of June seventeenth. He was not produced on the trial. Plaintiffs testified that they did not know where to find him; defendant was silent as to his whereabouts and offered no explanation for failing to produce him in court.

Defendant set up the special defense of the Statute of Frauds (Ill. Rev. Stat. 1959, ch. 59) and denied all allegations contained in the complaint. However, the court rejected the special defense on the authority of *Lusk v. Throop*, 189 Ill. 127. That case and decisions cited therein hold that where goods or services are furnished to a third person at the request and upon the credit of the promisor, the undertaking is original and not within the statute. Accordingly, the issue presented on trial was whether the legal services were rendered by plaintiffs at the request and upon the credit of defendant. There is little more in the record than the assertion by plaintiffs that Krumwiede had asked plaintiffs to render services for Bean and himself, and Krumwiede's denial thereof.

In view of the conflicting evidence, Bean would have been a material and important witness. Krumwiede asserted that he did not know Bean's whereabouts, but no evidence was offered by him or his wife as to any effort made to locate him. In October of 1958 Krumwiede had ordered Bean to leave his home. Defendant and Bean had been friends for fifteen years; as heretofore stated,

Krumwiede had obtained a job for him at defendant's place of employment and had taken him into his home. Plaintiffs argue that, because of the relationship of these two men, Krumwiede was in a much better position to produce Bean than were plaintiffs, who were total strangers to him. Furthermore, Krumwiede offered in evidence a receipt from the Cohens, but part of the instrument had been cut or torn off; Krumwiede gave no explanation for its alteration. On objection of plaintiffs, Krumwiede's counsel withdrew the exhibit, and it was not subsequently offered in evidence. Plaintiffs contend that under defendant's theory of the case it was Bean's property and he should have had possession of it; nevertheless, it was brought into court by Krumwiede, but in an altered condition. Plaintiffs suggest that Krumwiede took off that part of the instrument that indicated his liability.

Beery v. Breed, 311 Ill. App. 469, contains a lucid discussion as to the duty of a party to produce a material witness or document. After analysis of various decisions, the court quoted from Wigmore's Evidence (3rd ed., 1940, sec. 285) as follows (pp. 474-475):

"The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party."

And where one party makes a prima facie case, the failure of the other to produce any evidence warrants the inference that the testimony would be unfavorable to him.

After a careful examination of the record we have reached the conclusion that the finding and judgment are against the manifest weight of the evidence. The responsibility for finding Bean, or at least of proving that a careful and diligent search was made, was on Krumwiede. In addition, the receipt for services rendered was a material document; in this instance, too, the responsibility was on defendant to produce his exhibit in its original form, or, if this was impossible, to give a satisfactory explanation of its alteration. Accordingly, the judgment of the County Court is reversed, and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

BRYANT, P. J., and BURKE, J., CONCUR.

In The

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
Second Division

February Term, A.D. 1960

FILED

APR 18 1960

PAUL V. WUNDER
Clerk Appellate Court Second District

DONALD C. ALLENSWORTH,

Plaintiff-Petitioner,
Appellant,

vs.

W. ROLLO ALLENSWORTH,

Defendant-Executor,
AppelleeAppeal from the
Circuit Court of
Knox County

25 I.A. 25

SOLFISBURG, P.J.--

This is a suit in equity filed in the Circuit Court of Knox County, Illinois, on February 5, 1952, by the plaintiff for assignment of homestead rights in a two-apartment building in the City of Galesburg, Illinois. Plaintiff filed this cause and has conducted this suit pro se. After issue was joined, the cause was referred to the Master in Chancery of the Circuit Court of that county to report his findings of fact and conclusions of law. Evidence was presented by the parties to the Master who in due course reported his findings of fact and conclusions of law, which were filed on March 2, 1953. Ultimately, on March 20, 1956, the plaintiff filed exceptions to the Master's report. The record next indicates in a docket entry that in open court, on February 19, 1959, this suit was dismissed by the court for want of prosecution at the cost of the plaintiff, with leave to file a motion to vacate for good cause shown to the court within thirty days. On March 10, 1959, the plaintiff filed a motion to vacate the order of dismissal which merely realleged his exceptions to the Master's report. On April 10, 1959, the court entered a

In The

FILED

ILLINOIS COURT OF APPEALS

Second Division
Second District

APR 18 1960

PAUL V. WUNDER
Plaintiff-Appellant

February Term, A.D. 1960

DOMINIC O. ALLENBACH, JR.

Plaintiff-Appellee
Respondent

vs.

W. SCOTT ALLENBACH, JR.

Defendant-Appellee
Respondent

Special Term of
Illinois Court of
Appeals

1102-1103

RECORDING P. 1

This is a bill in equity filed in the Circuit Court of Cook County, Illinois, on February 5, 1959, by the plaintiff for assignment of household rights in a two-unit building in the City of Chicago, Illinois. The plaintiff filed this case and has conducted this case with him. After issue was joined, the case was referred to the master in Chancery of the Circuit Court of Cook County to report his findings of fact and conclusions of law. The master was presented by the parties to the master who in the course of his findings of fact and conclusions of law, which were filed on March 5, 1959. Ultimately, on March 30, 1959, the plaintiff filed responses to the master's report. The record was indicated in a brief entry that is open to the public. February 19, 1959, this bill was dismissed by the court and was at the time of the cost of the plaintiff, who leave to file a motion in equity for good cause shown to the court within thirty days. On March 10, 1959, the plaintiff filed a motion to vacate the order of dismissal which equity court his exceptions to the master's report. On April 10, 1959, the court entered a

docket order denying the plaintiff's motion to vacate the prior order of dismissal for want of prosecution, and the court again ordered the suit dismissed for want of prosecution. On April 14, 1959, the plaintiff filed a motion to reinstate this case. The court on the latter date entered its docket order reciting that after due consideration the motion to reinstate was denied. Plaintiff brings this appeal from the trial court's denial of his motion to reinstate. While the plaintiff's notice of appeal also makes reference to the overruling by the trial court of the plaintiff's exceptions to the Master's report, the abstract and record fail to disclose any ruling by the chancellor on the plaintiff's exceptions to the Master's report. Having before us no ruling by the chancellor on the plaintiff-appellant's exceptions to the Master's report, we are powerless to review such ruling, and, accordingly, we must consider this appeal as being taken from the trial court's orders of April 10, 1959, and April 14, 1959, denying plaintiff's motions to vacate the order of dismissal and to reinstate the cause.

The plaintiff-appellant has filed his brief herein wherein he argues the merits of his complaint and in which he fails to urge as error the trial court's rulings on his motion to vacate the order of dismissal for want of prosecution and his motion to reinstate. On appeal from a judgment or order dismissing a cause for want of prosecution, questions necessarily involved in determining the propriety of the judgment and order and only such questions will be considered. In reviewing the dismissal of this cause for want of prosecution, therefore, the sole question for this court is whether the dismissal was proper under all the circumstances. Plaintiff-appellant has ignored this point completely in his brief and argument, and under the circumstances this court, as a reviewing court, has no alternative but to affirm the judgment of the trial court. It is well established that a refusal to reinstate a case after dismissal will not be interfered with by an appellate tribunal in the absence of a clear showing of abuse of discretion, I.L.P.,

Appeal and Error, Section 760. It is equally well established that this court will not consider errors or points for reversal which are not raised in the briefs, Appellate Court Rule 7, for a failure to point out and argue an error constitutes a waiver of such error, Harper v. Sallee, 376 Ill. 540; In re. Estate of Wilson, 336 Ill. App. 18, affirmed 404 Ill. 207, 14 ALR 2d 940. Matters contained in the plaintiff-appellant's abstract fail to show any abuse of discretion on the part of the trial court in connection with the complained of ruling. The plaintiff's motions to vacate the order of dismissal and to reinstate the cause, set out in the abstract, fail to show any cause whatsoever for the plaintiff's failure to prosecute his case with diligence. This court will not consider a question which the abstract does not show to have been raised or contested in the trial court, Lehigh Valley Trans. v. Post Sugar Co., 128 Ill. App. 600, affirmed 228 Ill. 121.

I.L.P. Appeal and Error, Section 512. The consideration by a reviewing court must, of necessity, be limited to the record, the abstracts and the briefs. When an appellant fails to preserve in the record on appeal and in his abstract the rulings below complained of and his proper objection thereto or when he fails to raise in this court the points which this court may properly consider upon the record as it exists, this tribunal has no alternative but to affirm the ruling of the court below.

The order and judgment of the Circuit Court of Knox County, Illinois, is therefore affirmed.

*J. Crow
Concur.*

Affirmed.

Crow, J. and Wright, J. Concur

Appeal and Error, Section 70. It is usually well established that this court
 will not consider errors or points for reversal which are not raised in the
 briefs. Appellate Court Rule 7, for a failure to point out and argue an
 error constitutes a waiver of such error, People v. Wilson, 375 Ill. 100.
 In People of Wilson, 106 Ill. App. 2d, 404 Ill. App. 2d 240.
 Matters contained in the Statute and People's Statute that is not
 stated of objection on the part of the trial court is considered as the
 acquiescence of the trial court. The Statute is not to be raised in the
 brief and to consider the error, but one in the Statute, will be not
 considered for the Statute is Statute in Statute the case with
 difference. This court will not consider a question which the Statute
 not then to have been raised or considered in the trial court, People v. Wilson
People v. Wilson, 375 Ill. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Crow, J. and Wright, J. Concur

Abstract

GEN. NO. 11348

Agenda 13

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, 1960

FILED

APR 13 1960

BESS K. EHRESMAN,
Plaintiff-Appellant,

-vs-

THE TOWN OF LODA, and
PAULINE DEHM (Appellee),
Defendants-Appellees.

PAUL V. WUNDER
Clerk Appellate Court Second District

Appeal from
Circuit Court of
Iroquois County.

25 I.A. 25

GROW, J.

The plaintiff, Bess K. Ehresman, filed suit May 17, 1957 for personal injuries allegedly sustained by her October 24, 1955 about 2:30 p.m., while riding as a guest in the defendant Pauline Dehm's car while that defendant was driving the same northerly along a public township road about 1.4 miles north of Loda, Illinois. Count I of the Complaint is against the defendant Town of Loda for allegedly negligently failing to barricade a road or warn of an open ditch across a public highway, which ditch was concealed by weeds, but we are not presently concerned with that Count. Count II charges wilful and wanton misconduct of the defendant driver Pauline Dehm in driving her automobile through the weeds into the ditch, the misconduct being allegedly in five respects, namely, that she:

- a. Drove said automobile at a high and excessive speed, to-wit: about twenty (20) miles per hour, at a time when her visability of the roadway and road conditions was greatly impaired and when she knew or should have known that such driving would naturally and probably result in injury to plaintiff or others.

ATTORNEY GENERAL'S OFFICE
WASHINGTON, D. C.
JANUARY 1, 1904

RECEIVED
JAN 1 1904

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.
JANUARY 1, 1904

258.1.25

The following is a summary of the report of the Special Agent in Charge, New York, dated December 15, 1903, in relation to the activities of the "Black Legion" in New York City. The report states that the "Black Legion" is a secret organization composed of African American men, who are active in various parts of the city. The organization is known for its violent and criminal activities, and it is believed to be a threat to the public safety of New York City. The report also mentions that the "Black Legion" has a strong presence in the lower East Side of Manhattan, and that it is active in recruiting new members. The Special Agent in Charge, New York, has been instructed to continue to monitor the activities of the "Black Legion" and to report any further developments to the Department of Justice.

Very respectfully,
[Signature]
Special Agent in Charge, New York

- b. Drove said automobile with a wilful and wanton disregard for the safety of other persons and property, in violation of Section 145 Chapter 95½ of the Illinois Revised Statutes.
- c. Failed to keep said automobile under proper control, when she knew or should have known that such failure would naturally and probably cause injury to others.
- d. Failed to look at, see and observe the roadway in front of said automobile, when she knew or should have known that such failure would endanger the life or limb or the property of other persons.
- e. Failed to stop said automobile when, by the exercise of the slightest degree of care, said collision could have been avoided thereby.

The Complaint alleges the plaintiff to have been free of any wilful and wanton misconduct which caused or contributed to the plaintiff's injuries. The answer of the defendant Pauline Dehm denied each of those allegations as well as the balance of the allegations of the complaint, - issues of fact were made by the pleadings. A discovery deposition of the plaintiff was taken July 10, 1957, and was on file. On June 29, 1959, the defendant Dehm filed a motion for summary judgment on Count II based upon certain alleged admissions of the plaintiff in her discovery deposition. There were no supporting affidavits or counteraffidavits. The Court allowed the motion, entered a final judgment thereon for the defendant Dehm, and the plaintiff appeals, the Court expressly finding that there was no just reason for delaying enforcement or appeal, multiple parties being involved: CH. 110, ILL. REV. STATS., 1957, par. 50.

The Guest Statute, Sec. 9-201 of the Motor Vehicle Law, CH. 95½, ILL. REV. STATS., 1957, par. 9-201, provided, in substance, so far as material, that no person riding in a motor vehicle as a guest without payment for such ride shall have a cause of action

There was no discussion with a view to the
discovery of the cause of the accident and
the possibility of preventing it.

...the fact that the ...
...the fact that the ...
...the fact that the ...

[illegible]

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...the following are true of the

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for damages against the driver or operator of such motor vehicle for injury in case of accident unless such accident shall have been caused by the wilful and wanton misconduct of the driver and unless such wilful and wanton misconduct contributed to the injury.

In STEPHENS et al. v. WEIGEL (1946) 336 Ill. App. 36, the Court said:

"(5-7) Although no specific rule can be promulgated to determine categorically what constitutes wilful and wanton misconduct * * * it is generally established that defendant must exhibit a lack of regard for the safety of others, and a conscious indifference to the consequences that might follow from his acts. * * * Violation of a statutory speed limit does not per se constitute wilful and wanton misconduct, for in every case the attending circumstances must be taken into consideration. * * * It is not necessary, however, that defendant intended that plaintiff should be injured by reason of his acts, nor is it necessary that defendant actually know the dangers to which plaintiff is exposed. It is sufficient if he has notice which would alert a reasonably prudent man, and he does not take reasonable precautions under the circumstances."

And see: HERING v. HILTON (1958) 12 Ill. (2) 559; SIGNA v. ALLURI et al. (1953) 351 Ill. App. 11.

And the following from SCHNEIDERMAN v. INTERSTATE TRANSIT LINES, INC. (1946) 394 Ill. 569 has been frequently referred to in alleged wilful and wanton misconduct cases:

"A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care. (BROWN v. ILLINOIS TERMINAL CO., 319 Ill. 326; HEINDENREICH v. BRENNER, 260 Ill. 439; ILLINOIS CENTRAL RAILROAD CO. v. LEINER, 202 Ill. 624.) The question whether a personal injury has been inflicted by wilful or wanton conduct is a question of fact to be determined by the jury. BERNIER v. ILLINOIS CENTRAL RAILROAD CO., 296 Ill. 464. * * * * *

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed changes to the law of the United Kingdom in relation to the treatment of the British Commonwealth countries.

THE PHOENIX

(1) The first of these is the fact that the
 Government has not been able to secure the
 necessary funds to carry out its policy of
 maintaining a high level of employment.
 (2) The second is the fact that the
 Government has not been able to secure the
 necessary funds to carry out its policy of
 maintaining a high level of employment.
 (3) The third is the fact that the
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 (4) The fourth is the fact that the
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 (5) The fifth is the fact that the
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 (6) The sixth is the fact that the
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 (7) The seventh is the fact that the
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 (8) The eighth is the fact that the
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 necessary funds to carry out its policy of
 maintaining a high level of employment.
 (9) The ninth is the fact that the
 Government has not been able to secure the
 necessary funds to carry out its policy of
 maintaining a high level of employment.
 (10) The tenth is the fact that the
 Government has not been able to secure the
 necessary funds to carry out its policy of
 maintaining a high level of employment.

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Section 57 of the Civil Practice Act, CH. 110, ILL. REV. STATS., 1957, par. 57, relating to summary judgments etc., provided, so far as material:

* * * * *

(2) For defendant. A defendant may, at any time, move with or without supporting affidavits for a summary judgment or decree in his favor as to all or any part of the relief sought against him.

(3) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment or decree sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law. * * * * *

The only issue, therefore, is do "the pleadings, depositions, and admissions on file, * * * show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment * * * as a matter of law?"

Under Supreme Court Rule 19-10, CH. 110, ILL. REV. STATS., 1957, par. 101.19-10, a discovery deposition "so far as admissible under the rules of evidence" may be used, among other purposes, "as an admission made by a party * * * in the same manner and to the same extent as any other admission made by that person." And under Supreme Court Rule 15, CH. 110, ILL. REV. STATS., 1957, par. 101.15, affidavits in support of and in opposition to a motion for summary judgment "shall not consist of conclusions but of facts admissible in evidence". By analogy to such affidavits, under Rule 15, and under the particular provisions of Rule 19-10, though admissions made by a party in a discovery deposition may be used in connection with a motion for summary judgment, (MEIER v. POCIUS et al. (1958) 17 Ill. App. (2) 332; Cf. ALLEN v. MEYER

(1958) 14 Ill. (2) 284), only admissions of facts admissible in evidence may be so used, not admissions of conclusions, in the same manner and to the same extent as any other admission made by that person.

It was said in J. J. BROWN COMPANY, INC. vs. J. L. SIMMONS COMPANY, INC. (1954) 2 Ill. App. (2) 132: "The purpose of a summary judgment procedure is not to try an issue of fact but rather to determine whether one exists. * * * The right of the moving party should be free from doubt, determinable solely as a question of law. * * * Toward this end, the supporting affidavits are to be construed most strongly against the movant * * * and the whole record must be considered." And see: BERTLEE CO., INC. v. ILL. PUB. AND PRINT. CO. (1943) 320 Ill. App. 490; SCHUMACHER et al. v. FATTEN (1958) 18 Ill. App. (2) 387; LOVING v. ALLSTATE INS. CO. (1958) 17 Ill. App. (2) 230; HAUS v. JOANNA-WESTERN MILLS CO. (1958) 18 Ill. App. (2) 85.

With these principles in mind, we are called upon to determine whether a triable issue of material fact exists, after considering the entire record to this point, - the pleadings, deposition, admissions, if any therein, and all the testimony of the plaintiff in the deposition with respect to any of the allegations of wilful and wanton misconduct in the complaint, - is there no genuine issue as to any material fact and is the defendant entitled to a judgment as a matter of law?

From the deposition of the plaintiff we find the following facts are disclosed. The plaintiff is a farmer's wife, 57 years old, living on a forty-one acre farm and does not drive an

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automobile. On October 24, 1955, in the afternoon, Mrs. Dehm was driving her car. It was a nice day. The road was dry. She came by and picked the plaintiff up at her home in Loda, and they went to Paxton to shop. In going home they were driving over to see Mrs. Dehm's husband who was working on another farm. The defendant took a country road with gravel on each side. There was no sign that a bridge was out. There was no barricade. The plaintiff was sitting in the front seat and had picked up Mrs. Dehm's baby and put the baby on her lap. She didn't look at the speedometer. They had turned off a cement road, crossed over a railroad and went north on a country road. The road looked like it had been travelled, but it was only a single lane, with weeds on both sides and in the middle. It was not bumpy. The further north they went they came to a place where there was no travelled portion, - just nothing but weeds, they could not see the road, could not see a thing, the weeds were grown up for about 60 feet or so north to the point of the accident and they couldn't see anything for a little ways. The plaintiff had not been over the road before. They did not travel very far until they hit a hole, an open culvert, or ditch, - it was quite deep. The plaintiff did not see it until they got in it. It was covered with weeds. Until the instant the car hit the hole the plaintiff could not say there was anything wrong with Mrs. Dehm's driving; the plaintiff was not paying too much attention to Mrs. Dehm's driving. The plaintiff told Mrs. Dehm when they were getting in the weeds that she had better take it slow; the car was not going too fast; the plaintiff did not know how fast; they slowed down; the plaintiff

[illegible]

was looking straight ahead. Mrs. Dehm had hold of the wheel, and the plaintiff imagined that Mrs. Dehm was looking straight ahead. The car went down in the hole like a nose-dive and did not stop until it hit the bottom of the hole. The wheel broke. The plaintiff hit the top of the car. While sitting there for about one-half hour after the occurrence they saw some railroad men who said a bridge had been out for some time and that there had been a culvert in the road where the car went down. At the time this happened the plaintiff did not blame the defendant.

The defendant's motion for summary judgment lists eight alleged admissions which she urges the plaintiff made and which she asserts are sufficient to bar plaintiff's recovery as against her. They are as follows:

1. At the time of the occurrence in question defendant Pauline Dehm's automobile was not going too fast. I don't know what the speed of her automobile was.
2. Shortly prior to the accident, defendant's car slowed down.
3. Neither plaintiff nor defendant, Pauline Dehm, saw the hole in the road or knew it was there until the instant the car hit it.
4. Up to the instant when the car hit the hole, plaintiff could not say there was anything wrong with defendant's driving of her car.
5. At the time and place of the accident both plaintiff and defendant were looking straight ahead in front of the car.
6. At the time the accident occurred, plaintiff did not blame the defendant Pauline Dehm.
7. Prior to the accident the road was not bumpy.
8. After the road became covered with weeds the car did not travel very far until it hit the hole.

From such evidence as is before us, - the plaintiff's discovery deposition, - it can be assumed for the present purpose

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From 1950 to 1955, the number of people in the United States who were employed in the service industries increased from 10 million to 15 million. This increase was due to a number of factors, including the growth of the retail and food service industries, the expansion of the health care industry, and the development of the service sector as a major part of the economy.

that the defendant Behm did not intentionally desire to injure the plaintiff or actually know the danger to which the plaintiff was exposed. But, as was said in STEPHENS et al. vs. WEIGEL, supra, it is not necessary that defendant intended that plaintiff be injured by reason of her acts, nor is it necessary that defendant actually knew of the danger to which the plaintiff was exposed. It is sufficient if the defendant had notice that would alert a reasonably prudent person driving a car under those circumstances of danger ahead and if the driver does not take reasonable precautions under the circumstances, - if the driver exhibit a lack of regard for the safety of others and a conscious indifference to the consequences that might follow from her acts.

It will be noted that the plaintiff has charged in the complaint, among other things, that the defendant failed to look at, see and observe the roadway in front of the automobile, when she knew or should have known that such failure would endanger the life, or limb or property of other persons, and that she failed to stop the automobile. Considering as a whole the alleged admissions of the plaintiff, the whole present record, and the principles of law which we must apply, we believe there is a triable genuine issue of material fact under at least those allegations of the complaint.

Only two of the claimed admissions of the plaintiff set forth in the defendant's motion for summary judgment require particular comment, - one being that the plaintiff could not say there was anything wrong with the defendant's driving of the car, and, another, that after the impact the plaintiff did not blame the

defendant. The first could be reasonably construed as referring only to the manual, physical handling of the car by the defendant, and if so construed, it is not a positive unequivocal statement of fact but is merely an expression of opinion or conclusion. The other assumes that there was a conversation of some kind between the plaintiff and defendant afterwards, but there is nothing to indicate that the plaintiff made any remark, one way or the other, to the defendant relating to the conduct of the defendant, after the impact, and, further, whether the plaintiff did or did not "blame" the defendant has no relevancy or materiality in any event. The plaintiff was not required to "blame" the defendant immediately afterwards in order to have, or preserve, a cause of action. With regard to the other claimed admissions, the comment that the automobile was not going too fast is, in any event, a mere expression of opinion or conclusion and not of facts admissible in evidence, and its weight or significance is considerably tempered by the plaintiff's further testimony that she did not know what the speed was, she did not drive an automobile herself, she did not look at the speedometer, and she was not paying too much attention to Mrs. Dehn's driving. Just when the car slowed down is not made very clear from the deposition, but that isolated fact or circumstance, though a proper matter to be considered with all other facts and circumstances, does not mean there is no genuine issue as to any material fact or that the defendant Dehn was entitled to a judgment as a matter of law. There is nothing to indicate specifically when Mrs. Dehn saw the hole or ditch, but if she did not see it or know it was there until the instant the car hit it such may be equally as consistent, or perhaps more consistent, with a theory of liability under the complaint than not. That the

plaintiff imagined Mrs. Dehm was looking straight ahead is hardly a positive, unequivocal statement of fact that Mrs. Dehm was looking straight ahead in front of the car, particularly if, as she says, the plaintiff was not paying too much attention to Mrs. Dehm's driving. That the road was not bumpy, and that after it became covered with weeds the car did not travel very far until it hit the hole are particular detailed factual elements not to be considered alone or out of context but with all other relevant facts and circumstances, and taken by themselves they do not necessarily absolve the defendant Dehm or mean there is no genuine issue as to any material fact or that that defendant was entitled to a judgment as a matter of law.

The record evidence thus far, - the deposition of the plaintiff, - with all the reasonable inferences, intendments, and implications thereof drawn favorably to the plaintiff, - indicates that the defendant drove on ground completely covered with weeds at the point in question, where there was no travelled road, when she could not know or see where she was going, and continued more or less blindly ahead until the car suddenly hit the hole or culvert or ditch where the culvert had been with such a sharp impact that the plaintiff hit the top of the car, causing her injuries. Whether or not such conduct of the defendant driver indicated a reckless disregard for the safety of the plaintiff, - a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care, - or a conscious indifference to the consequences that might follow from the defendant's acts was a genuine issue of material fact. The present record contains evidence upon which reasonable men might differ, which tended to substantiate certain of the plain-

tiff's allegations of the defendant Dehn's wilful and wanton misconduct: STEPHENS et al. v. WEIGEL, supra. The right of the moving party here, the defendant Dehn, is not free from doubt, and is not determinable solely as a question of law: J. J. BROWN CO., INC. v. J. L. SIMONS CO., INC., supra.

It is our judgment that the present record, from which all reasonable inferences, intendments, and implications should be drawn in favor of the plaintiff, does not contain admissions of material, relevant fact which would necessarily bar the plaintiff's alleged cause of action, and we cannot say there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law.

The judgment is, accordingly, reversed and the cause remanded with directions to deny the motion of the defendant for summary judgment.

REVERSED and REMANDED,
with directions.

Concur
By *Solfisburg* h PJ

Solfisburg, P. J. and Wright, J. Concur.

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Selfishness, P. J. and Wright, J. Connor.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
(First Division)
OCTOBER TERM, A.D. 1959

FILED

APR 18 1960

PAUL V. WUNDER
Clerk Appellate Court Second District

ORELL L. MUELLER,

Plaintiff-Appellant,

vs.

SIMONE MUELLER, alias, etc.,

Defendant-Appellee.

Appeal from the Circuit
Court of DuPage County,
Wheaton, Illinois25 I.A.²¹ 260

SPIVEY--J.

This is an appeal from an order granting defendant judgment in a replevin action at the close of the plaintiff's case. Plaintiff and defendant are husband and wife, and prior to September 23, 1959, lived together in Naperville. On September 23, the defendant asked for the family car, drove the plaintiff to his work in Chicago, kissed him goodbye and agreed to meet him at 5:30 for an evening at the Palmer House. Instead, that afternoon, she called her husband to advise him that she had left him and had taken all the household furnishings.

This action for replevin followed. The plaintiff listed and claimed a great many items of property in his complaint. To further complicate the issues, a long time prior to this action, the defendant gave the plaintiff her almost unlimited power of attorney which gave the plaintiff power to demand, recover, and receive any goods and chattels belonging to her. This power of attorney was admitted in evidence as an exhibit on behalf of the plaintiff.

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As to some of the articles claimed by the plaintiff, there is a dispute as to whether they belong to plaintiff or defendant or both. Still other items, by uncontradicted testimony, are clearly the sole property of the plaintiff or defendant as the case may be, and other items are clearly the property of both plaintiff and defendant either jointly or in common.

The court concluded that the plaintiff failed to show a right to possession of any of the property superior to that of the wife and granted judgment for the defendant at the close of the plaintiff's case.

No brief was filed in this court on behalf of the defendant-appellee. We would be justified in reversing and remanding the cause without further discussion. Basinski v. Basinski, 20 Ill. App. 2d. 336; 156 N.E. 2d. 225; and Eckells et al. v. City Council of City of East St. Louis, 163 N.E. 2d. 107. We have, however, followed the long standing rule of searching the record to affirm. Voegele v. Kidd, 18 Ill. App. 2d. 400, 152 N.E. 2d. 887.

The Civil Practice Act, (Ill. Rev. Stat. 1959, Chap. 110, Par. 64.5) provides as follows:

"Upon the trial of a proceeding in equity and in cases at law tried without a jury defendant may, at the close of plaintiff's case, move for a finding, judgment or decree in his favor. In ruling on the motion the court shall weigh the evidence. If the ruling on the motion is favorable to the defendant, a judgment or decree dismissing the action shall be entered. If the ruling on the motion is adverse to the defendant he may proceed to adduce evidence in support of his defense, in which event the motion is waived.

"If a judgment or decree of dismissal entered at the close of the plaintiff's case is reversed on appeal, the cause shall be remanded to the trial court with directions to proceed as though the motion had been denied by the trial court or waived."

The trial court overlooked uncontradicted testimony clearly establishing plaintiff's right to possession of certain

items of property and in so doing, his findings on questions of fact are clearly wrong. The defendant when called as an adverse witness did not testify that she had a right to the possession of all of the property requested in the plaintiff's complaint, and failed to rebut in any way plaintiff's evidence of a right to possession. Where it is clear that the trial court has erred in weighing the evidence, it is the duty of the Appellate Court to reverse the cause. (Dobie v. Livingood, 12 Ill. App. 2d. 343, 139 N.E. 599; Ward v. Illiopolis Food Lockers, Inc., 9 Ill. App. 2d. 129, 132 N.E. 2d. 591). Under the unchallenged evidence presented at this state of the trial, the plaintiff would be entitled to at least some of the property demanded and for this reason, the court should have denied the motion for judgment for defendant. The judgment of the trial court is, therefore, reversed and remanded to the Circuit Court of DuPage County with instructions to proceed as though the motion had been denied by the trial court.

Reversed and remanded
with directions.

McNeal, P. J., and Dove, J., concur.

of fact are clearly shown. The defendant who called as an adverse witness did not testify that she had a right to the possession of all of the property requested in the complaint, and failed to refer to any plaintiff's evidence of a right to possession. Where it is clear that the trial court has tried the witness for evidence, it is the duty of the appellate court to reverse the same. (People v. Livingston, 12 Ill. App. 2d 145, 139 N.E. 2d 109; People v. Williams, 12 Ill. App. 2d 145, 139 N.E. 2d 109). Under the undisputed evidence presented at this state of the trial, the district court is entitled to at least some of the property claimed and for this reason, the court should have denied the motion for judgment for defendant. The judgment of the trial court is reversed, reversed and remanded to the Circuit Court of Dallas County with instructions to proceed as though the matter had been tried by the trial court.

Reversed and remanded
with directions.

McNeal, P. J., and Dove, J., concur.

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Abstract

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APR 18 1966

PAUL V. WUNDER
Clerk Appellate Court Second District

FEBRUARY TERM, A. D. 1960

25 L.A. 261^{2d}

Under the terms of the policy, the plaintiff was entitled to recover from the defendant the sum of \$10.00 per day for

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the days that she was hospitalized because of sickness and a surgical operation.

The case was tried before the court without a jury and the court found that the plaintiff was entitled to recover the sum of \$670.00 for sixty-seven days of hospitalization by reason of plaintiff's sickness and surgical operation and entered judgment for \$870.50, from which judgment the defendant has taken this appeal.

The number of days that plaintiff was hospitalized because of her surgical operation for sickness is the sole question presented in this case. Defendant contends that the last forty-seven days of plaintiff's hospitalization was not caused by her sickness and the surgical operation performed and that the judgment is excessive in the amount of \$470.00; that the judgment is contrary to the manifest weight of the evidence, and that the trial court erred in admitting hearsay evidence.

Defendant prays that the judgment of the trial court be affirmed upon condition that plaintiff consent to a remittitur in the amount of \$470.00, otherwise the judgment be reversed and the cause remanded for a new trial.

It is admitted that there was a valid contract of insurance during the time in question which provided payment to the plaintiff the sum of \$10.00 per day for hospitalization

1. The first of these is the fact that the system is not a simple one, but a complex one, involving many different factors and many different people. The second is the fact that the system is not a static one, but a dynamic one, which is constantly changing and evolving. The third is the fact that the system is not a closed one, but an open one, which is constantly interacting with the outside world. The fourth is the fact that the system is not a linear one, but a non-linear one, which is characterized by feedback loops and other non-linear relationships. The fifth is the fact that the system is not a deterministic one, but a probabilistic one, which is characterized by uncertainty and risk. The sixth is the fact that the system is not a single one, but a multiple one, which is characterized by many different goals and objectives. The seventh is the fact that the system is not a simple one, but a complex one, which is characterized by many different factors and many different people. The eighth is the fact that the system is not a static one, but a dynamic one, which is constantly changing and evolving. The ninth is the fact that the system is not a closed one, but an open one, which is constantly interacting with the outside world. The tenth is the fact that the system is not a linear one, but a non-linear one, which is characterized by feedback loops and other non-linear relationships. The eleventh is the fact that the system is not a deterministic one, but a probabilistic one, which is characterized by uncertainty and risk. The twelfth is the fact that the system is not a single one, but a multiple one, which is characterized by many different goals and objectives.

The case was tried before the court without a jury and the court found that the plaintiff was entitled to recover the sum of \$475.00 for the value of the property destroyed by the fire. The court also awarded the plaintiff costs and interest on the judgment for \$10.00. The total judgment was \$485.00.

The number of days that plaintiff was hospitalized because of his physical condition for treatment is not an issue presented by this case. Defendant contends that the last forty days have not plaintiff's hospitalization was not caused by his physical condition and not defendant's physical condition. The court is convinced that the plaintiff's physical condition was the cause of his hospitalization and that the plaintiff's physical condition was the cause of his hospitalization. The court is convinced that the plaintiff's physical condition was the cause of his hospitalization and that the plaintiff's physical condition was the cause of his hospitalization.

The above information was obtained from a review of the records of the Department of Social Services, New York City, and is being furnished to you for your information.

incurred because of bodily injuries or sickness. Plaintiff, on January 30, 1953, entered St. Anthony's Hospital in Rock Island, Illinois, and underwent surgery for the excision of a ganglionic cyst from the belly portion of her right thumb. Following the operation, plaintiff remained a patient in the hospital until her discharge on April 4, 1953.

The Post-operative care of plaintiff consisted of medication being applied to the thumb, hypodermics and medication for pain, hot applications of boric acid compresses, various ointments, paraffin baths, and heat therapy. This care and treatment continued substantially during the time plaintiff was in the hospital. The same care and treatment was also given plaintiff either at her residence or at the office of her physician, subsequent to plaintiff's discharge from the hospital, with the exception of the bed rest and hypodermics for pain and sedative purposes.

During plaintiff's stay in the hospital, she had partial use of her fingers with the ability to passively flex and extend them, and had the full use of her wrist and arm. Plaintiff testified that she was ambulatory after the first two or three weeks following the surgery, and her physician stated that she was confined to her bed for a period of ten days after the surgery. Plaintiff testified that while in the hospital, she had to have her food cut up in bites for her,

[illegible]

and have her hair arranged by others, and that after her discharge from the hospital, she still could not use her hand and that she went across the street to a drug store for meals sometimes and the waitresses cut up her food for her.

Plaintiff testified that she still does not have the use of her thumb for certain things; that in the last year, she could turn a radio off and on for the first time, but she cannot now open a water faucet or sew.

There was some testimony on cross examination of plaintiff that she remained in the hospital because that was where she wanted to be; that she had a conversation with her physician a week before she left the hospital and told him that her maid would not be back until Tuesday morning.

Plaintiff's physician, Dr. C. P. O'Neill, testified on cross examination that plaintiff remained in the hospital because she didn't have anyone to care for her at home. He also stated that she stayed in the hospital so long because she needed the treatment. Dr. O'Neill further testified that plaintiff's admission to the hospital was on his professional advice; that the continued stay was on the same advice; and that in his opinion the hospitalization was necessary.

Dr. O'Neill further testified that immediately following the removal of the cyst, plaintiff had a continuation of previously described pain which accentuated with time

[illegible][illegible]

indicating a complication; that during the convalescent period, which is normally ten to fourteen days, plaintiff had more pain than usual and required more treatment than usual; that she was given hypodermics and medication to ease the pain and that her pain was out of proportion to the usual type of condition.

Dr. O'Neill testified over the objections of defendant to the subsequent diagnosis by one Dr. Montgomery, who was not present in court and who did not testify, of a Sudek's atrophy of plaintiff's thumb. This diagnosis was made following plaintiff's discharge from St. Anthony's Hospital.

The evidence objected to as hearsay was produced during the direct examination by plaintiff of Dr. O'Neill. The evidence objected to was hearsay but was a voluntary statement or remark by the doctor and was not solicited by the plaintiff. The testimony complained of, the objection and the remark of the trial court are as follows:

"Q. Subsequent to the reference to Dr. Bessmer, did you refer her any place else for medical attention?

A. And that was in April--let's see, April 29 he suggested that she was developing a demineralization of her bones, or osteoporosis, and he suggested certain treatments, including which was paraffin baths, and we tried her on that for awhile and she made some improvement, but it wasn't complete, so

[illegible]

we referred her then to a specialist in Chicago, Dr. Montgomery, who had her hospitalized at the Kenrothin Hospital and who made a diagnosis of Sudek's atrophy.

By Mr. Crampton: Now, Your Honor, I feel I have to object to the doctor's testimony and to another doctor's diagnosis and what was done by the other doctor.

By the Court: I am accepting this testimony as indicating that the woman was not cured. That is the main argument."

The evidence objected to was, in fact, hearsay, however, we cannot say that it was so prejudicial as to constitute reversible error. This case was heard by the trial court without a jury and it is presumed that the trial judge in making his findings and rendering his judgment considered only material and competent evidence. *Livingston v. Livingston*, 334 Ill. App. 261, 78 N. E. 2d 831.

There seems to be no question that plaintiff's stay in the hospital was for a longer period of time than normal. Defendant introduced the hospital records to indicate that plaintiff was ambulatory for a great number of days and by insinuation tries to indicate that it was solely the personal desire of the plaintiff to remain in the hospital and not a matter of medical necessity. Plaintiff's physician, on the other hand, testified the original admission to the hospital

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator will then gather information about the problem and the people involved. This information will be used to develop a plan of action.

On the morning of the 1st of June, I was in the office of the Chief of Police, and he informed me that the following persons had been arrested on the 1st of June, and were now in the city hall:

we cannot say that it was as established as in previous
investigations. This case was found by the total count
without a jump and it is presumed that the total weight of
methyl and isopropyl and tertiary and quaternary carbons only
is about 10% of the total weight.

[illegible]

and the continued stay by plaintiff were both upon his professional advice and that the same was necessary. The medical evidence further reveals that her recovery was not the usual or average convalescence and that she had more pain than usual and required more treatment than usual. Defendant did not offer any medical evidence to the contrary. In this state of the record we certainly cannot say that the judgment of the trial court is against the manifest weight of the evidence.

The policy in question provided that plaintiff would be paid the daily hospital rate of \$10.00 per day not to exceed one hundred days for hospitalization because of bodily injuries or sickness and by reason of the sickness and surgical operation. We are of the opinion that the trial court was correct in entering judgment for the period of time actually spent in the hospital and that such hospitalization was because of "bodily injuries and sickness" within the meaning of the policy in question. The judgment of the trial court was amply supported in this respect by the testimony of plaintiff's physician. Defendant's policy was in no way limited for what might be "average" or a "normal" period of hospitalization. The policy of insurance before us is clear and unambiguous and plaintiff under the evidence is entitled to the protection she bought and paid for at the request of

but the continued way for officials with both eyes open
Continued action and with the same old machinery. The medical
evidence further suggests that the country has not been
by various organizations and that the old way is still
usual and repeated with enormous loss of life. The old
and often very similar evidence to the country. In this
side of the world we certainly cannot say that the judgment
of the trial court is against the medical evidence of the
evidence.

The policy in question provided that plaintiffs would be
paid the daily hospital rate of \$14.00 per day and in cases
not limited days for hospitalization because of injury is
issue of damages and is based on the medical and hospital
evidence. It is of the opinion that the trial court was
correct in refusing judgment for the period of time actually
spent in the hospital and that such hospitalization was the
cause of "bodily injuries and sickness" within the meaning of
the policy in question. The judgment of the trial court was
highly supported in this respect by the testimony of

plaintiff's physician. Defendant's policy was in no way
limited the time spent in "average" or a "normal" period of
hospitalization. The policy of insurance policy is to clear
and establish that plaintiff's injury and sickness is covered
to the extent the benefit was paid for as the result of

defendant's agent and on defendant's own terms.

The plaintiff and defendant both agree that there was an honest mistake of fact made by both of them and the trial court concerning the actual number of days that plaintiff spent in the hospital.

The trial court found that plaintiff was in the hospital sixty-seven days. The plaintiff admits that sixty-seven days is incorrect and states that the actual number of days should be sixty-five. The defendant states that the actual number of days spent in the hospital were sixty-four. Our review of the record indicates that the plaintiff was admitted at 1:00 o'clock P. M. on January 30, 1953, and discharged on April 4, 1953, at 2:00 o'clock P. M. This would make a total of sixty-four days not including April 4th.

For the reasons above noted, the judgment, through an honest mistake of fact by the trial court and parties, is excessive in the amount of \$30.00. Therefore, the judgment of the trial court is affirmed upon filing by plaintiff her consent to a remittitur in the sum of \$30.00, otherwise the judgment is reversed and the cause remanded for a new trial.

JUDGMENT AFFIRMED UPON FILING CONSENT TO A
REMITTITUR, OTHERWISE, JUDGMENT REVERSED
AND CAUSE REMANDED FOR A NEW TRIAL.

Concur
R. Solisburg
Solisburg, P. J. and Crow, J., Concur.

the following:

Examining the report number of each case listed above in
reverse order of last name of each of them and the birth date
The District and National Birth Index will give us
Holmes's age and an indication of her class.

The total amount paid was \$100.00. The balance due was \$100.00. The balance due was \$100.00.

There have been no meetings April 1961.

For the reasons above stated, the judgment, entered in the
District Court of East St. Louis, Illinois, is affirmed.
Costs in the amount of \$10.00. Therefore, the judgment of
the District Court is affirmed, costs being paid by plaintiff and one
copy of a writ of habeas corpus is granted to defendant.

Solifsbury, P. J. and Crow, J., 1969. Concomitant

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10282

Agenda No. 9

Ira Sayles,

Plaintiff-Appellant,

vs.

Appeal from the
Circuit Court of
Champaign County

The Board of Fire and Police Commissioners
of the City of Champaign, Illinois,

Defendant-Appellee.

25 I.A.^{2d} 262

REYNOLDS, P. J.

This is an action under the Administrative Review Act, seeking to reverse the findings and decision of the Board of Fire and Police Commissioners of the City of Champaign, Illinois, discharging the plaintiff, Ira Sayles, from the police force of the City of Champaign. The plaintiff became a member of the Champaign Police Department in 1949 and served continuously until June 1958 when he was suspended from the force. Charges were preferred against him in accordance with the terms of Article 14 of the Cities and Village Act (Article 14, Chapter 24, Illinois Revised Statutes). In accordance with the provisions of said Article 14, hearing on the charges was held by the Board of Fire and Police Commissioners of the City on the 5th day of August 1958 and the

Abstract

THE CITY OF CHICAGO
OFFICE OF THE CLERK
JULY 1958

Report No. 5

General No. 1000

Report from the
Citizens' Council of
Chicago, January

Plaintiff-Defendant

vs.

The Board of Fire and Police Commissioners
of the City of Chicago, Illinois

Defendant-Plaintiff

202-14-202

REPLY, p. 1.

This is an action under the Administrative Review Act,
seeking to reverse the findings and decision of the Board of
Fire and Police Commissioners of the City of Chicago, Illinois,
discharging the plaintiff, the defendant, from the police force of
the City of Chicago. The plaintiff became a member of the
Chicago Police Department in 1953 and served continuously until
June 1958 when he was removed from the force. Orders were
issued against him in accordance with the terms of Article 14
of the Charter and Village Act (Article 14, Chapter 24, Illinois
Revised Statutes). In accordance with the provisions of said Article
14, pending on the matter was held by the Board of Fire and Police
Commissioners of the City on the 25th day of August 1958 and the

plaintiff was ordered discharged as of September 10, 1958.

He filed his petition for administrative review in the Circuit Court of Champaign County, and on July 2, 1959, the Circuit Court affirmed the findings and decision of the Board of Fire and Police Commissioners. The plaintiff appeals to this court.

Originally there were three sets of charges filed against the plaintiff. Some charges were withdrawn, some were held to be not sustained by the evidence, and charges were dismissed. Since the inquiry of this court will deal only with those charges which the Board of Fire and Police Commissioners of the City of Champaign held were sustained, and upon which their decision to discharge the plaintiff is based, this court will only consider those charges and the evidence thereon. There is no question raised in the pleadings that there had been any failure to give the plaintiff due notice of the charges against him, or that the Board of Fire and Police Commissioners had failed to carry out all the provisions of Article 14 of the Cities and Villages Act, relative to discharge of a member of the police department, and while there was some claims of improper evidence at the time of the hearing, these matters are not raised in the appeal and are not considered.

Specification No. 10 of the charges dated July 17, 1958,

charged the plaintiff with failing to pay his personal bills, taxes and just debts promptly, thereby causing the officials of the City of Champaign to receive many complaints from merchants and other creditors of the plaintiff for failure to pay his just debts. The Board held the evidence sustained this charge.

Part of Specification No. 11 of the charges dated July 17, 1958, also charged the plaintiff with failing to pay his personal bills and just debts in violation of Rule 47 of the Police Department of the City of Champaign. The Board held the evidence sustained this charge.

Specification No. 12 of the charges dated July 17, 1958, charged the plaintiff had brought discredit upon himself and upon the Police Department of the City, and had destroyed his usefulness and efficiency as a police officer. The Board held the evidence sustained this charge.

On July 25, 1958, further charges were brought, charging the plaintiff with violation of Rule No. 47 of the Rules and Regulations of the Police Department, which again referred to failure to pay his personal bills and just debts, and a violation of Rule No. 50 of the said rules and regulations, which provides that no policeman shall assign his salary in advance. Specification No. 1 of

charged the plaintiff with failing to pay his personal bills, taxes and just debts promptly, thereby causing the officials of the City of Chicago to receive many complaints from merchants and other creditors of the plaintiff for failure to pay his just debts. The Board held the evidence sustained this charge.

Part of Specification No. 11 of the charges dated July 17, 1938, also charged the plaintiff with failing to pay his personal bills and just debts in violation of Rule 47 of the Police Department of the City of Chicago. The Board held the evidence sustained this charge.

Specification No. 12 of the charges dated July 17, 1938, charged the plaintiff had brought discredit upon himself and upon the Police Department of the City, and had destroyed his usefulness and efficiency as a police officer. The Board held the evidence sustained this charge.

On July 25, 1938, further charges were brought, charging the plaintiff with violation of Rule No. 47 of the Rules and Regulations of the Police Department, which again referred to failure to pay his personal bills and just debts, and a violation of Rule No. 50 of the said rules and regulations, which provides that no policeman shall assign his salary in advance. Specification no. 1 of

the charges of July 25, 1958, recited that the plaintiff made a wage assignment to the Logan Furniture Mart, Inc., of Chicago, Illinois, in the amount of \$1038.30 and that failure to pay the debt violated Rule No. 47, and the assignment of wages violated Rule No. 50. The Board held the evidence sustained these charges.

The appeal raises two questions, (1) the finding made by the Board and the decision thereon were not supported by the evidence and were therefore against the manifest weight of the evidence, and (2) even if sufficient proof had been produced to support the charges made, such charges were trivial in nature and could not be grounds for discharge of the plaintiff.

It had been generally held by the courts of this State that reviewing courts do not have the right to re-weigh evidence but have only the power to determine if the findings are against the manifest weight of the evidence. Nolting v. Civil Service Commission, 7 Ill. App. 2d 147; Secaur v. Civil Service Commission, 408 Ill. 197; Foreman v. Civil Service Commission, 7 Ill. App. 2d 122; Rude v. Seibert, 22 Ill. App. 2d 477, 483; Chicago v. Atkins, 19 Ill. App. 2d 177, 182. "Manifest" has been defined as clearly evident, clear, plain, indisputable. Schneiderman v. Interstate Transit Lines, Inc., 331 Ill. App. 143; Rude v. Seibert, 22 Ill. App. 2d 477; Chicago v. Atkins, 19 Ill. App. 2d 177.

the charges on July 23, 1935, recited that the plaintiff was a
was assigned to the Logan Furniture Mart, Inc., of Chicago,
Illinois, in the amount of \$1000.00 and that failure to pay the
but violated Rule No. 47, and the statement of wages violated
Rule No. 50. The court held the evidence sustained these charges.

The appeal raises two questions, (1) the finding made by
the court and the decision thereon were not supported by the evi-
dence and were therefore against the manifest weight of the evidence,
and (2) even if sufficient proof had been introduced to support the
charges made, such charges were trivial in nature and could not be
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have only the power to determine if the findings are against the
manifest weight of the evidence. Welling v. Civil Service Commission,
7 Ill. App. 2d 147; Leach v. Civil Service Commission, 408 Ill. 187;
Forster v. Civil Service Commission, 7 Ill. App. 2d 122; Rule v.
Albert, 22 Ill. App. 2d 477, 483; Chicago v. Atkins, 19 Ill. App.
2d 177, 182. "Manifest" has been defined as clearly evident, clear,
plain, indisputable. Schmideman v. Interstate Transit Lines, Inc.,
231 Ill. App. 143; Rule v. Albert, 12 Ill. App. 2d 477; Chicago v.
Atkins, 19 Ill. App. 2d 177.

In this case, the evidence is conflicting. Without going into detail there does not seem to be any doubt that the plaintiff owed personal debts and taxes which he had not paid. It also seems undisputed that he had executed an assignment of wages, although he tries to explain this by saying that he signed it in blank. Such actions on his part violated the cited sections of the Rules and Regulations of the Police Department of the City of Champaign. The Board of Fire and Police Commissioners of the City did not constitute a judicial body, yet they, by reason of the authority conferred upon them by the provisions of Article 14 of the Cities and Villages Act, became triers of fact. They, sitting as a board, had to make a decision as to whether or not the charges were sustained. They, like a judge or jury, were in a position to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof. The board held that the charges were sustained, and as a reviewing court we have no right to substitute our judgment for that of the board unless the decision and finding is clearly and manifestly against the weight of the evidence. After reviewing the evidence we cannot say the decision and finding is against the manifest weight of the evidence.

This leaves the contention that the failure of the plaintiff

In this case, the evidence is conflicting. Without going into detail there does not seem to be any doubt that the plaintiff owed personal debts and taxes which he had not paid. It also seems undisputed that he had executed an assignment of wages, although he tries to explain this by saying that he signed it in blank. Such actions on his part violated the cited sections of the Rules and Regulations of the Police Department of the City of Chicago. The Board of Fire and Police Commissioners of the City did not constitute a judicial body, yet they, by reason of the authority conferred upon them by the provisions of Article 14 of the Cities and Villages Act, became triers of fact. They, sitting as a board, had to make a decision as to whether or not the charges were sustained. They, like a judge or jury, were in a position to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof. The board held that the charges were sustained, and as a reviewing court we have no right to substitute our judgment for that of the board unless the decision and finding is clearly and manifestly against the weight of the evidence. After reviewing the evidence we cannot say the decision and finding is against the manifest weight of the evidence.

This leaves the contention that the failure of the plaintiff

to pay his personal debts and obligations and the assignment of his wages in violation of the rules and regulations of the Police Department of the City are such trivial violations that the order of discharge should not be sustained.

The plaintiff cites the case of Nolting v. Civil Service Commission, 7 Ill. App. 2d 147, in support of his contention that the violations charged were trivial. While that case stated that the cause for removal could not be arbitrary or unreasonable, it also held in a statement on removal for cause, that "cause" was some substantial shortcoming which rendered continuance of an officer in his office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognized as a good cause for his no longer occupying the place. In the instant case, certain rules and regulations affecting and governing all police officers of the City of Champaign had been adopted, and were in full force and effect. The plaintiff was or should have been aware of them. Yet he was found guilty of violation of two of these rules. The Nolting v. Civil Service Commission case quotes from the case of Coane v. Geary, 298 Ill. App. 199, where it was said: "A police force is peculiar, sui generis, you may say, in its formation and in its relation to the city government. It is practically an organized

to pay his personal debts and obligations and the assignment of his wages in violation of the rules and regulations of the Police Department of the City are such trivial violations that the order of discharge should not be sustained.

The plaintiff cites the case of Notling v. Civil Service

Commission, 7 Ill. App. 2d 147, in support of his contention that the violations charged were trivial. While that case stated that the cause for removal could not be arbitrary or unreasonable, it also held in a statement on removal for cause, that "cause" was

some substantial shortcoming which rendered continuance of an officer in his office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognized as a good cause for his no longer occupying the place. In the instant case, certain rules and regulations affecting and governing all police officers of the

City of Chicago had been adopted, and were in full force and effect. The plaintiff was or should have been aware of them. Yet he was found guilty of violation of two of these rules. The Notling

v. Civil Service Commission case quotes from the case of Corn v.

Geary, 206 Ill. App. 198, where it was said: "A police force is

peculiar, and general, you may say, in its formation and in its relation to the city government. It is practically an organized

force resembling in many respects a military force, organized under the laws of the United States and equally as important as to the functions it is required to perform."

"And there is the same necessity of discipline - of regulation existing in the police department that exists in regard to the military department. Strict discipline must be enforced, and it must be enforced in a manner that is effective, and without the supervision or regulation of any other department of the state, and particularly, without any attempt on the part of the judicial department (which is a branch of the government entirely distinct and separate from the executive department), to regulate it in any way, and particularly, to regulate its discipline."

The Coane v. Geary case, quoted from the case of O'Regan v. City of Chicago, rendered November 29, 1904, Chicago Legal News, Vol. 37, page 150, by Judge Murray F. Tuley, where Judge Tuley in stating the duties of policemen and the right of superiors to discipline them, said: "This man goes into office as a patrolman. At the time he goes into office there is found (according to the evidence) in existence a set of rules and regulations promulgated by that department, existing for years before he became a member, which prescribes the manner in which he shall act, and his superiors shall act towards him, to a very large extent. It lays down the discipline to which he is to become subject by reason of his enlistment, or rather his taking his oath of office as a policeman." While

forces resembling in many respects a military force, organized

under the laws of the United States and equally as important

as to the functions it is required to perform.

"And there is the same necessity of discipline - of punish-

ment existing in the police department that exists in regard to

the military department. Strict discipline must be enforced, and

it must be enforced in a manner that is effective, and without

the supervision or regulation of any other department of the

state, and particularly without any attempt on the part of the

Judicial department (which is a branch of the government entirely

distinct and separate from the executive department), to regulate

it in any way, and particularly to regulate its discipline."

The People v. Kelly case, quoted from the case of People v.

City of Chicago, rendered November 29, 1904, Chicago Legal News,

Vol. 37, page 120, by Judge Henry F. Taylor, where Taylor says

in stating the duties of policemen and the right of superior to

discipline them, said: "This man came into office as a policeman.

At the time he came into office there is found (according to the

evidence) in existence a set of rules and regulations promulgated

by that department, existing for years before he became a member,

which prescribe the manner in which he shall act, and the

superior shall not instruct him, to a very large extent. To lay

down the discipline to which he is to become subject by reason of his

employment, or rather his service as a policeman." While

the rules enunciated by Judge Tuley apply to a large city like Chicago, they are equally applicable to the City of Champaign. A policeman is not like other city employees. He stands as a symbol of government and authority. He represents to the average citizen, the protector and preserver of our laws and our individual rights. He may not do or fail to do things that ordinary citizens may do, or fail to do. He is by reason of his position, a man set apart. Because of the constant danger of his work, the unpleasantness that can and does often occur in the carrying out of his duties, our lawmakers have seen fit to throw up certain safeguards about his job and its tenure. He may not be discharged except for cause. He is entitled to be served with written charges and be represented by counsel and have a hearing before a board to determine the truth or falsity of the charges. But, he must also conform to discipline and rules. If a police officer goes about owing various citizens and refuses or neglects to pay his taxes and his obligations, he is not only bringing discredit upon himself and his family, but he is bringing discredit upon the police force of his city. He is tarnishing the shield of authority he wears by violating the rules of the department in which he works. This court does not regard the failure and neglect or refusal of a police officer to pay his personal debts as trivial. If this were an isolated instance, this

the rules enumerated by Judge Wiley apply to a large city like Chicago, they are equally applicable to the City of Chicago. A policeman is not like other city employees. He stands as a symbol of government and authority. He represents to the average citizen, the protector and preserver of our laws and our individual rights. He may not do or fail to do things that ordinary citizens may do, or fail to do. He is by reason of his position, a man set apart. Because of the constant danger of his work, the unpleasantness that can and does often occur in the carrying out of his duties, our lawmakers have seen fit to throw up certain safeguards about his job and his tenure. He may not be discharged except for cause. He is entitled to be served with written charges and be represented by counsel and have a hearing before a board to determine the truth or falsity of the charges. But, he must also conform to discipline and rules. If a police officer goes about doing various citizens and refuses or neglects to pay his taxes and his obligations, he is not only bringing discredit upon himself and his family, but he is bringing discredit upon the police force of his city. He is tarnishing the shield of authority he wears by violating the rules of the department in which he works. This court does not intend the failure and neglect or refusal of a police officer to pay his personal debts as trivial. If this were an isolated instance, this

court might view it differently. But from the evidence in this case, other persons had made complaint to the Chief of Police about unpaid bills of this officer. These failures and violations on the part of the officer tended to bad discipline in the Champaign Police Department. Discipline and conformity to rules in a police department are not trivial, but are very important. In the Nolting v. Civil Service Commission case the importance and necessity of discipline in a police department is emphasized by reference to the book "Police Administration" by O. W. Wilson, the new Police Commissioner of the City of Chicago and a leading authority on the subject. The Board of Fire and Police Commissioners have deemed it necessary that this officer be dismissed. The Circuit Court of Champaign County affirmed the decision of the Board. From the record, this court sees no reason to interfere in a matter which is clearly a matter of internal discipline in the Police Department of the City of Champaign.

Judgment affirmed.

CARROLL and ROETH, JJ., concur.

198

RUSSELL T. MUELLER,

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

Appellees.

25 I.A.^{Zd} 263

Plaintiff filed an amended complaint in equity to establish the existence of an oral partnership between him and defendant, to obtain a decree recognizing his claimed right to an interest in the profits resulting from the sale of land referred to as the Niles subdivision in Illinois, which he alleges to have been partnership property, and to be given an accounting. The chancellor adopted the findings and recommendations of the master, and entered a decree dismissing the complaint for want of equity, from which plaintiff appeals.

The amended complaint alleged that during the latter part of 1952 the parties entered into an oral partnership agreement. The business of the partnership was to purchase vacant land and construct thereon residential and commercial buildings for speculative sale, all profits to be divided equally between the parties. Plaintiff was to act as general contractor and also as carpenter contractor; defendant was to serve as subcontractor for setting of tile. To carry on the

business, the parties organized a corporation on February 24, 1953 under the name of Styline Homes, Inc.; each contributed initial capital of \$1000.00 and owned one-half of the stock in the corporation. Although the master found that the dealings of the parties and the corporation in past transactions were immaterial to a determination of their rights in the Niles property, he set out in his findings that on a number of occasions defendant advanced his own funds to purchase vacant property on which the corporation subsequently erected residential buildings to be sold. In each case defendant retained ownership of the vacant property for a period exceeding six months, and made a profit on the sale of the vacant land; these capital gains belonged to defendant--he did not share them with the corporation in any manner, and they were not considered in the division of profits between the parties.

The facts with respect to the Niles property disclose that in July 1954 defendant purchased this land with his own funds and took title in his own name and that of his wife. When defendant first learned of the property through a broker, he called it to the attention of plaintiff, who said that it might be a good investment for the defendant personally but that he (plaintiff) himself was not interested in the property, nor did he think it suitable for building at that time. Defendant then purchased the land and held it for two and one-half years. During that period it appreciated in value, and he was able to sell it at a profit. At no time did plaintiff contribute or

-3-

offer to contribute to the cost of the property. In 1955 plaintiff offered to buy the land from defendant. A contract was prepared but not signed. Plaintiff, at the initiation of the transaction, agreed to the terms, but later, learning of problems involving off-site improvements, felt that he did not have sufficient resources to make the purchase and develop the property, and he accordingly so advised defendant. At a later date, when the property had increased in value because of development in adjoining land, plaintiff reconsidered and offered to buy the property, but defendant declined to sell.

The basic theory of plaintiff's amended complaint is that of a resulting trust. In view of the clear fact that plaintiff had no interest in the property when title vested in defendant, no constructive or resulting trust can arise in plaintiff's favor. The object of the doctrine of resulting trusts, said the court in *Paluszek v. Wohlrab*, 1 Ill.2d 363, 366, is

to enforce a presumed intention . . . arising from the acts of the parties. . . . A resulting trust arises, if at all, the instant the legal title vests. . . . The burden of proof rests upon the party seeking to establish such trust, and the evidence, to be effective for this purpose, must be clear, convincing, unequivocal and unmistakable, and if doubtful or capable of reasonable explanation upon any theory other than the existence of the trust it is insufficient.

Numerous Illinois decisions and *Bogert on Trusts* are cited in support of this proposition. See also the early case of *Furber v. Page*, 143 Ill. 622.

From the evidence adduced upon the hearing, it appears that when the parties first decided to engage in a building venture they decided on a corporation, not a partnership. This is admitted in the amended complaint. Moreover, there never was a written partnership agreement. The corporation bought land, took title, built the houses; it borrowed money from the stockholders, filed income-tax returns, and maintained a bank account. Conversely, there never was a partnership bank account, nor any partnership tax returns; no buildings were built or sold, nor was any business transacted, except by the corporation. Although a partnership is claimed by plaintiff, there is no evidence of even a single partnership transaction. Since he alleged the existence of a partnership, it was incumbent upon him to prove it. He variously claimed that the partnership existed for many years before the Niles property was purchased-- that it was formed some time late, in 1954, or early in 1955, or in 1956; but the master found, and the decree recites, that no partnership existed.

Although plaintiff first claimed that the Niles property was bought subject to an agreement with him, the following questions and answers, as appear from an examination of plaintiff, indicate that he completely abandoned this position:

Master: When Mr. Sloan bought the Niles property, did he buy it for the corporation?

Witness: Mr. Sloan bought that land initially for investment with the understanding between us that if it was developed it would be with future building sites for Styline..

Master: You said that at the beginning of the examination as I recall it, that when he first bought the land, it was his own deal. Now you say that when he first bought the land there was an understanding that it was for the corporation. Which is correct?

Witness: Well, I'll say he bought it for himself individually.

Master: So, your answer to the previous question that when he bought it, it was not bought for the corporation.

Witness: I'll say that was it.

Mr. Bloch
[Attorney
for defend-
ant]: Q. There was no understanding at all at the time he bought it, that it was anything but his deal, is that correct, yes or no.

A. That's where I have to give a double answer. If you want the answer, "No," you have the answer, "No."

Master: Just answer the question.

Witness: No, there was no understanding.

Plaintiff testified that if the property had been sold a week after purchase, he would have had no interest or claim therein whatsoever, and that defendant was free at the time he bought the property to farm it, sell it, build on it, or use it in any other way he chose. Plaintiff's testimony was in fact an admission that when defendant purchased the property plaintiff had no interest or claim therein. "To have made this land partnership property," said the court in *Alkire v. Kahle*, 123 Ill. 496, 504, "it must have been purchased with partnership funds for partnership purposes, or at least there must have been one of such elements present." To the same effect see also *Nehrkorn v. Tissier*, 352 Ill. 181.

A careful examination of the record discloses that the Niles property was always treated by plaintiff and defendant as belonging solely to defendant. As disclosed by the evidence, plaintiff had never seen the Niles property until he was told about it by defendant. He took no part in the negotiations for the purchase thereof, never paid or offered to pay any part of the purchase price, and never obligated himself to defendant to do anything in connection with the property. Defendant, who furnished the money for the purchase of the land, assumed all the risk of its depreciation. It was only when the land had appreciated in value that plaintiff claimed an interest therein. We think the decree approving the master's findings and dismissing the complaint for want of equity, was proper, and it is therefore affirmed.

DECREE AFFIRMED.

BRYANT, P. J., and FRIEND, J., CONCUR.

982

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47750

WILLIAM F. THORNTON,

Appellant,

v.

GEORGE L. RAMSEY, COMMISSIONER of
BUILDINGS, THE CIVIL SERVICE
COMMISSION OF THE CITY OF CHICAGO,
DOLORES L. SHEEHAN, JOHN J. AHERN,
and ALBERT W. WILLIAMS,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

25 I.A. 263²

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from the judgment of the Superior Court of Cook County affirming the findings and decision of the Civil Service Commission. The Commission found that appellant was guilty of conduct unbecoming an employee of the City of Chicago in that he had violated section 13-28 of the Municipal Code of the City of Chicago, which provides:

"Every employee of the Department of Buildings, shall devote all of his efforts to such employment and shall not be engaged in any other business or vocation."

Appellant began the operation of a business of architecture and building construction at 108 N. Dearborn Street in the City of Chicago in 1939. While so engaged, he was examined for the position of Building Inspector of Chicago. As a result of that test, he was placed in the number one position among the applicants for the appointment.

Appellant and one David J. Maddox, a business associate, signed a lease to run from July 1, 1954, through June 30, 1957 on

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office space located at 106-10 West Lake Street, Chicago. Appellant paid the entire rental for the full term in advance. The offices were known as those of "William F. Thornton & Associates & Metropolitan Construction Service."

On August 16, 1954, appellant was appointed a Building Inspector of the City of Chicago. He turned over his business to James Andrews, as office manager, and Robert Armsted, a business associate. His wife, Mrs. Urath P. Thornton, was brought into the business to protect his interest therein.

On January 7, 1955, in the course of his duties as a building inspector, appellant inspected premises known as The Home for Aged Colored People, at 4432 South Vincennes Ave. in Chicago. He reported violations to the Department of Buildings which caused the license application of the Home to be refused. The president of the Home was unaware that an inspection had been made until the application was disapproved.

Appellant had served on the board of directors of the Home, and was well acquainted with the president, who called him when the application was disapproved. Appellant went to the Home and determined what work had to be done. He arranged for the work to be done. He was instrumental in obtaining a loan from the Home Federal Savings and Loan Association of Chicago to the Home for that purpose.

In order to obtain the loan, appellant made application to the lender on behalf of the Home. The dealer's application

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was signed by appellant and his wife. It represented that appellant was a structural engineer for William F. Thornton & Associates. Four Suppliers are given as references and two lenders are indicated as having discounted paper for the applicant in the past. A financial statement, signed by the appellant, was sent to Home Federal in a letter bearing the letterhead of "Metropolitan Construction Service" which was also signed by appellant. It contained a list of assets of the company. The approval of the dealer application and the preparation of the loan for the work to be done were made for "William F. Thornton & Associates & Metropolitan Construction Service." The loan application contained the following statement, "I certify that I am the person who sold this job," and after the statement is the signature of the appellant.

A credit report obtained by Home Federal in connection with the dealership application indicates that "William F. Thornton & Associates a/k/a Metropolitan Construction Co.," is a general contractor with William F. Thornton "sole owner". It states that plaintiff employs eight people, with his wife assisting him in clerical matters. Appellant is said to draw \$6,000 per year and to turn the rest back into the business.

The payment book indicates that the first payment made under the loan to the Home for Aged Colored People was to "William F. Thornton." The check was in the amount of \$600, payable to "Metropolitan Construction Service," and was endorsed by appellant's wife for Metropolitan and deposited in

the account of "William F. Thorton & Associates."

After the work had been completed on the Home, appellant made another inspection and recommended approval to the Building Department.

In 1956, further work was done on the Home and the proceeds of another loan from Home Federal were paid to Metropolitan Construction Service. A check for \$450 was deposited in the account of Metropolitan by a stamped endorsement with no individual's name endorsed thereon.

The complaint was filed with the Civil Service Commission on July 9, 1957. The appellant sought review of the Commission's decision in the Superior Court, pursuant to the provisions of the Illinois Administrative Review Act. On February 4, 1959, the court rendered its decision affirming the action taken by the Commission.

The testimony at the hearing was conflicting. Two witnesses were called by appellant to testify that they had done the work and that it had been paid for by Metropolitan. However, one testified that he received \$875, which is \$275 more than the loan made to pay for the improvements, that he had received the money from Mrs. Thornton and that he then turned the check over to Mr. Armsted, the office manager, who was to pay the bills; the other, who worked on the 1956 construction at the Home, did not know exactly how much he had received or from whom, although a receipt for \$450 was produced.

Appellant testified that he had made application for credit as a dealer for the benefit of his wife and the other men taking over the business, and that he had not been involved in any of the business of the company since becoming a building inspector.

Appellant contends that the Commission's action is against the manifest weight of the evidence. Under the Administrative Review Act the findings of the administrative agency on questions of fact are prima facie correct, (Ill. Rev. Stat. 1959, Chap. 110, sec. 274,) however, they may be reviewed to determine whether they are supported by the evidence, and may be set aside only if they are against the manifest weight of the evidence. *Logan v. Civil Service Commission*, 3 Ill.2d 81. *Miglieri v. Lee*, 16 Ill. App.2d 545.

The evidence in the present case has been carefully analyzed to determine its manifest weight and we are of the opinion that the findings and order of the commission is not contrary to the manifest weight of the evidence. Although the ostensible recipient of the income was Metropolitan, some of it came into appellant's account. Appellant used his name and reputation in assisting the firm to achieve dealership approval under Title I of the National Housing Act. As a dealer, the firm contracted with the Home on the basis of contacts of the appellant and estimates signed by him and was instrumental in procuring the loan. There was no clear break from the former activity as a building contractor when the appellant engaged in

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substantially the same activity after being appointed as a building inspector, a position dovetailing very nicely with a building contractor's work.

Appellant also contends that he did not violate the provisions of Section 13-28 of the Municipal Code of Chicago, quoted above, because that provision applies not to all outside activities, but only those which affect the public interest through their effects upon the performance of the office held. Even if this were the true interpretation of the ordinance, we think that the outside activities, as found by the commission, fall within that category. It would be difficult to imagine a more advantageous position for a person in the business of remodeling and altering buildings, than that of building inspector, with the power to approve any work completed or to disapprove buildings from which work might be forthcoming for the business.

Appellant's contention that the work was charitable assistance to the Home is not justification for a violation of the rules governing his position with the City.

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

BURKE and FRIEND, JJ., CONCUR.

25 I.A.^{2d} 439

47842

DAVID ARCHITECTURAL METALS, INC.,
a corporation,

Plaintiff,

v.

AMERICAN NATIONAL BANK and TRUST
COMPANY of CHICAGO, as Trustee
under Trusts Nos. 11139 and 10912;
HERBERT CONSTRUCTION CORPORATION,
a corporation,

Defendants, and Counter-defendants-
Appellants,

THE EQUITABLE LIFE ASSURANCE SOCIETY
of the UNITED STATES, a corporation, et al.,

Defendants and Counter-defendants,

ARTHUR M. GELDEN CO., a corporation,
Defendant and Counter-plaintiff-
Appellee,

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is a case which originally was a Mechanic's Lien case. It was started by sub-contractors who claimed the remedy of Mechanic's Lien foreclosure and who set forth the claims of the various parties in the proceedings. It was answered by the sub-contractor Arthur M. Gelden & Co., and they filed their counterclaim and claimed the same lien and asked the relief of sale under the Mechanic's Lien Law. After the pleadings of both parties had set forth the nature of the action, then upon the suggestion of the court, the pleadings were amended to allow them to find a definite amount due to Arthur M. Gelden & Co., the sub-contractor. Thereupon the court entered a summary judgment for \$133,677.67 in favor of the sub-contractor and against the general contractor and the owner from which this appeal was taken. No proof was taken and only affidavits were had as to the verity of the obligation.

The purpose of the summary judgment procedure is not to try an issue of fact but to determine whether one exists between the parties. "If the defense is arguable, apparent, made in good faith, it should be submitted to a jury." *Schumacher v. Fatten*, 18 Ill. App.2d 387. The whole record must be considered. *Sampson v. Mandel Bros., Inc.*, 3 Ill. App.2d 92. If an examination of the pleadings and affidavits submitted in support of a motion for summary judgment reveal that a material dispute exists as issues of fact, summary judgment should be denied. *Sharp v. City of Chicago*, 13 Ill. 2d 157.

In the instant case, there were numerous figures set up as having been added to the value of the premises and therefore as being the basis for a lien, all of which were contradicted by the principal defendants. There were numerous issues of fact as to whether these claimants had rendered the services. One of the issues in this case was whether the sub-contractor, Arthur M. Gelden & Co., had performed all of the services that it was to render and whether it was necessary to employ another contractor to render additional services to make good his contract. In addition to that, Gelden had sworn the existence of a contract and four or five sub-contractors of Gelden had a lien for material and labors furnished which claims Gelden had sworn did not exist, that is, that there was no money due them as sub-contractors of Gelden.

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Appellee's contention that by filing a motion for summary judgment, appellant has waived the right to contend that a factual question is involved, cannot be sustained, since the statement therein that there were no issues of fact was directed solely to appellant's motion for summary judgment and appellee's subsequent answer, which were based upon different theories than appellee's motion for summary judgment, to which appellant's answer did allege that factual questions existed. Allen v. Meyer, 14 Ill.2d 284, relied upon by appellee, is clearly distinguishable in that the parties there were agreed that only questions of law were involved.

It therefore appears that there were sufficient claims against Arthur M. Gelden & Co. for failure to do the work in accordance with their contract, that the definite amount was not due and that there was set up a question of fact which must of necessity be determined by the trial court and upon which the summary judgment could not be entered, and the summary judgment is therefore reversed and the cause is remanded with directions to the trial court to conduct further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

BURKE and FRIEND, JJ., CONCUR.

47757

EMMERLEAN CARTER,

Plaintiff-Appellant,

v.

NEW YORK CENTRAL RAILROAD, a
Corporation, and CITY OF CHICAGO,
A Municipal Corporation,

Defendants-Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

25 I.A.^{2d} 264

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Emmerlean Carter sued the City of Chicago and the New York Central Railroad Company for personal injuries resulting from a collision between the automobile in which she was riding and a center post supporting elevated tracks of the railroad at South Park Avenue near 67th Street in Chicago. The jury returned a verdict of not guilty as to both defendants. A motion for a new trial was denied. Plaintiff appeals from the judgment.

Plaintiff was a guest passenger in the automobile being operated in a southerly direction on South Park Avenue by her companion, Ivory Allen, at about 12:30 A.M., on September 14, 1952. The streets were wet. The vehicle struck an unlighted pillar. Plaintiff was thrown forward into the windshield. The pillar was 450 feet south of 67th Street and in the center of South Park Avenue. Visibility was poor; with "city lights" on the vehicle an unlighted object could be seen by the driver at only 10 or 12 feet. The automobile was moving at 15 to 20 miles per

-2-

hour when the driver first saw the pillar. There was testimony that the light on the pillar had been out for about one week preceding the occurrence. The responsibility for keeping the viaduct and its pillar lighted was shared by the city and the railroad. The railroad takes care of defective fixtures or circuits and the city takes care of fuses and lamps. A maintenance man for the city, called as a witness for the plaintiff, testified that according to his records at 8:30 on the evening of September 13 he discovered an "outage" at the location and that his records indicated that he hung a lantern on the pilot fixture on the center post of the viaduct at that time. Witnesses for the city and the railroad testified in support of their contentions as to the circuit and the lighting. Plaintiff was taken to a hospital and treated for her injuries.

Plaintiff maintains that reversible error was committed when defendants laid a foundation for impeachment of Allen and plaintiff without an effort to establish the supposed impeaching testimony, citing *Gordon v. Checker Taxi Co.*, 334 Ill. App. 313; *Miller v. Chicago Transit Authority*, 3 Ill. App. 2d 223; and other cases. The subject matter of the cross-examination complained of has to do with whether or not Allen applied his brakes prior to collision, and whether or not a second automobile collided with the rear end of the Allen vehicle while plaintiff was sitting therein. Allen and plaintiff initially were party

plaintiffs in the action. At the conclusion of the selection of the jury Allen was dismissed as a party plaintiff. In February, 1954, both testified in pretrial depositions, at which time their attorney and the attorney for the railroad were present. Both witnesses at the trial admitted testifying by way of depositions. The attorney for plaintiff who was present at the taking of the depositions was present at the trial. Plaintiff and her attorney had transcripts of the depositions.

Both witnesses were asked questions concerning their prior testimony relating to the operation of the brakes by Allen and the view of the viaduct prior to the collision. Plaintiff did not remember any question asked or answer given during her deposition. Allen "at this particular time" did not remember whether or not he had testified during his deposition concerning his familiarity with the street. He knew that he did not testify on his deposition that "I couldn't put on the brakes" because "I didn't put on the brakes." In the trial Allen testified that he applied his brakes with full force and skidded into the viaduct. Plaintiff testified that Allen applied his brakes and skidded into the viaduct. Allen's testimony on deposition that he could not apply his brakes was substantiated by him during the trial. Allen testified during the trial that he did not apply his brakes, but also testified during the trial, as did plaintiff, that he did apply his brakes before the collision. On this point the inconsistency

was established apart from the depositions and failure to prove the questions and answers claimed to be in the depositions could not harm the plaintiff.

There was testimony of a second automobile striking Allen's vehicle in the rear while plaintiff was a passenger therein. On direct and cross-examination plaintiff and Allen denied that a second automobile struck Allen's vehicle until after both Allen and plaintiff departed for the hospital. On cross-examination of Allen and plaintiff both witnesses were confronted with their claimed prior testimony given in their depositions wherein they stated that a second automobile struck the Allen vehicle while plaintiff was sitting in the front seat. In her testimony on the trial plaintiff was unable to remember any of her testimony on deposition. On the trial Allen admitted that he had testified during his deposition that a second automobile crashed into his vehicle while plaintiff was still seated in the front seat. Allen then testified that plaintiff was still in his automobile when the second crash occurred. The record is silent as to any objection made by counsel for plaintiff concerning the use of the deposition and the impeachment resulting therefrom and concerning any motion to strike the testimony so elicited. See *Bell v. Toluca Coal Co.*, 272 Ill. 576; *Kelleher v. Chicago City Ry. Co.*, 256 Ill. 454; *Lehigh Stone Co. v. Industrial Commission*, 315 Ill. 431; *Lindsey v. Rosen*, 255 Ill. App. 21; *Graham v. Dressen*, 292 Ill.

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App. 15. We do not feel that the cases cited by plaintiff are applicable to the factual situation of the instant case. Plaintiff has failed to sustain the burden of showing that the alleged error was prejudicial or worked to her detriment.

Plaintiff complains of error because the court gave four instructions on the subject of impeachment. Two of them were given at the request of the city, one at the request of the railroad and one at the request of plaintiff. The instruction given at the request of the railroad differed from the others in that it told the jurors that they had no right to disregard the testimony of any unimpeached witness sworn on behalf of the defendants simply because such witness was or is an employee of a defendant, etc. On the record we cannot say that the plaintiff was harmed by these instructions, one of which was given at her request.

The judgment is based on substantial evidence. We do not find reversible error. The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P. J., and FRIEND, J., CONCUR.

48005

COUNTY OF COOK, a Body
Politie and Corporate,

Appellee,

v.

VICTOR YACKTMAN,

Appellant.

INTERLOCUTORY

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

25 I.A. ^{2d} 448

MR. JUSTICE McCORMICK DELIVERED THE
OPINION OF THE COURT.

This interlocutory appeal is taken from an order entered by the Superior Court of Cook County temporarily enjoining the defendant from constructing any structure or developing or establishing any use on certain premises owned by him in Cook County without obtaining a permit from the Cook County building and zoning bureau. The injunctional order was based upon a complaint filed by the County of Cook and defendant's answer thereto.

From the pleadings it appears that the real estate here in question was formerly owned by one Roger A. Rockenbach and his wife. On August 20, 1940 the board of commissioners of Cook County adopted a zoning ordinance whereby the said premises were classified in an "F-Farming" district. That ordinance granted certain permissive uses within such district. Automobile drive-in theatres were not listed among the permissive uses. In 1957 the Rockenbachs filed an action in the Circuit Court asking for a declaratory judgment against the County of Cook, and on May 28, 1957 a declaratory judgment was entered holding that the said zoning ordinance was, as applied to the property of the plaintiffs, uncon-

stitutional and void inasmuch as it deprived the plaintiffs of property without compensation and without due process of law.

On August 13, 1957 the county board amended the section of the ordinance applicable to "F-Farming" districts. The amendment reclassified, as "special uses," certain of the permissive uses which had been listed in the ordinance, and added to the special uses automobile drive-in theatres. The amendment further provided that a person who desired a special use must file an application with the zoning board of appeals. After a hearing the board reports its findings and recommendations to the county commissioners, and if a written protest against the proposed special use is presented by owners of twenty percent of the adjoining frontage, etc., a special use shall not be granted except by the favorable vote of three-fourths of the members of the county board. There are certain other provisions with reference to the necessity of a finding by the zoning board of appeals that the special use will not be detrimental to the public welfare etc., and the county board may stipulate such restrictions as are deemed necessary for the public interest. If such conditions are not met the grant of the special use may be revoked.

On or about July 15, 1959 the defendant applied to the building and zoning bureau of Cook County for a permit authorizing the construction of an automobile drive-in theatre upon the subject premises. A month later his

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application was denied on the grounds that the Circuit Court judgment had invalidated only the ordinance as it existed on May 28, 1957 and that the August 1957 amendment "rendered the prior judgment ineffective." The defendant apparently had complied with all requirements essential for a permit except those relating to applications for a special use within an "F-Farming" district.

On or about September 15, 1959 the defendant filed a petition as relator in the Circuit Court of Cook County for a writ of mandamus, the prayer of which petition asked that the court order the county and its agents to issue a permit for the construction and operation of an automobile drive-in theatre on the subject premises. Pleadings were filed and the suit was at issue. The case was continued twice over the objection of the relator. He thereupon filed a petition in which he stated that the only question presented in the mandamus action is whether the 1957 amendment to the Cook County zoning ordinance is sufficient to invalidate the prior judgment of the Circuit Court, and he prayed that the court should immediately adjudicate the mandamus case, and if the court did not promptly adjudicate it the petitioner would discontinue the mandamus action and proceed with the construction immediately. On January 6, 1960 the defendant took a nonsuit in the mandamus action.

On or about January 8, 1960 the defendant commenced the construction of an automobile drive-in theatre without any permit having been issued to him by the county. The county

filed the instant suit on January 15, 1960 praying that the defendant be enjoined permanently from constructing, operating or maintaining an automobile drive-in theatre on the premises in question, and from any construction and establishment of any use on the premises without first obtaining a permit from the county. The complaint also prayed for a temporary injunction against the defendant.

In the complaint it was alleged, among other things, that there is presently pending before the county board of Cook County a comprehensive amendment to the zoning ordinance of Cook County; that this amendment is the result of more than two years' work by zoning consultants employed by the county; that approximately thirty-six public hearings were held by the zoning board of appeals and said board on December 22, 1959 recommended that the amendment, as amended, be adopted by the board of commissioners; that under the provisions of said amendment the premises in question would be classified in districts in which automobile drive-in theatres are prohibited; and that the defendant is proceeding to construct the said theatre for the purpose of establishing a vested right. To this complaint defendant on January 22, 1960 filed a verified answer setting up the facts heretofore stated, and alleged that the subject premises are not within an "F-Farming" district since the judgment entered in the Circuit Court in May 1957, declaring the ordinance unconstitutional in its application to the instant property, had completely abrogated the ordinance so far as the defendant's property was concerned; that the property was in the

same condition as though no zoning ordinance with reference to it had ever been passed; that the August, 1957 amendment did not rezone the subject property so as to bring it back under the scope of the ordinance; and that the said amendment "in no way cures the defects of the Zoning Ordinance theretofore adjudged * * * to be unconstitutional and void as to the subject premises." To this answer the defendant attached as exhibits a letter from the building and zoning bureau of Cook County, dated August 18, 1959, which indicated the reason for the rejection of the permit, the petition filed by him in the Circuit Court with reference to the mandamus action, the judgment order of May 28, 1957 of the Circuit Court declaring the ordinance unconstitutional insofar as it applies to the subject property, and the applicable section of the zoning ordinance with amendments to April 1952.

On January 27, 1960 the ^{Superior}~~Circuit~~ Court entered an order that the defendant, pending a final hearing and disposition of the cause, be enjoined from constructing any structure or establishing any use on the premises without first obtaining a permit from the County of Cook. From that order this appeal is taken.

Perkins
for Beck, clerk
pr

The primary purpose of a temporary injunction is to preserve the status quo for further proceedings. The merits of the controversy are not brought before the reviewing court by an interlocutory appeal. Shatz v. Paul, 7 Ill. App. 2d 223. The application for a temporary injunction is directed to the conscience and sound discretion of the court and is not controlled by technical legal rules. Cragg v. Levinson, 238 Ill. 69. Unless a reviewing court finds that the discretion has been abused the order will not be set aside. Bernard

Bros., Inc. v. Deibler, 326 Ill. App. 538; Bowman Shoe Co. v. Bowman, 21 Ill. App. 2d 423, and cases therein cited. All that is necessary is that the complaint prima facie state a cause of action. Scholz v. Barbee, 344 Ill. App. 630. As was said in Bowman Shoe Co. v. Bowman, supra:

"* * * we purposely refrain at this time at this preliminary stage of this litigation from any extended comment on the pleadings or the facts as they appear from the record and from any extensive statement of the considerations and reasons leading to our conclusion, lest such be incorrectly construed or interpreted as indicating an opinion by us, as to the ultimate merits of the controversy, and this we wish to avoid. The ultimate merits of the controversy, and, indeed, the definitive legal sufficiency of the complaint are not before us at this time and nothing herein is to be considered as expressing any view thereon."

In the case before us there are controverted~~ed~~ issues of law and fact: first, as to whether or not the amendment to the ordinance had obviated that portion of the ordinance which caused the Circuit Court to hold that said ordinance was unconstitutional in its application to the property of the defendant, and in determining the basis upon which the Circuit Court rested its opinion it would be necessary to make a complete examination of the pleadings in the case and the issues raised therein; second, if the court should find that the amendment was sufficient to remove the objection that the ordinance in its application to the defendant's property was unconstitutional, then it would be necessary to determine whether in the interim between the declaratory judgment and the amendment of the ordinance any vested rights had been

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acquired by the defendant; and third, whether or not under the rule set out in Chicago Title & Trust Co. v. Palatine, 22 Ill. App. 2d 264, the county officials were justified in refusing to grant the permit.

We think that the showing made before the trial court was sufficient to permit the trial court to exercise his discretion in issuing the temporary injunction. There was no abuse of discretion.

The order of the ^{Superior}~~Circuit~~ Court granting the temporary injunction is affirmed.

Affirmed.

Dempsey, P.J., and Schwartz, J., concur.

Abstract only.



47807

STACK HANNAUR,

Appellee,

v.

CHICAGO TRANSIT AUTHORITY,
etc., et al.,

Defendants.

CHICAGO TRANSIT AUTHORITY,
a Municipal Corporation,

Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

25 I.A.^{2d} 454

MR. JUSTICE SCHWARTZ DELIVERED THE
OPINION OF THE COURT.

This is an appeal by defendant from a judgment on verdict for \$30,000 in a personal injury suit. The principal issue is the propriety of an instruction which bound defendant to the exercise of the highest degree of care while plaintiff was upon depot grounds.

Plaintiff's injuries resulted from an accident which occurred on January 25, 1958 before or after plaintiff had alighted from a 79th Street bus owned and operated by defendant. The accident took place at a bus terminal, located on the east side of Western Avenue, several hundred feet north of 79th Street, in Chicago.

The manner in which the accident occurred is in dispute. Evidence adduced by plaintiff tended to show that he had been a passenger on the bus involved; that the bus stopped in the terminal alongside and south of a wooden platform upon which passengers disembarked; that the bus

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was then facing west; that plaintiff was alighting or had already alighted and was moving in a westerly and southerly direction in front of the bus; that the bus having discharged its passengers then began moving westward, striking plaintiff with the right front of the bus and causing him to fall under the right front wheel.

Defendant's evidence showed or tended to show that plaintiff had completely alighted; that he had been at or near the right front door of the bus at the time it began moving westward; that at this time plaintiff was walking or running westward alongside the bus, possibly tapping on the front door; and that in some way he slipped under the right front wheel of the bus from the side.

There are contradictions and inconsistencies in the testimony given by plaintiff and his witness when their versions are compared with prior statements given by them and when compared with each other. Nor did defendant's driver and witnesses give versions completely compatible with each other. It was a close case.

The first error relates to plaintiff's instruction No. 6, which reads as follows:

"The defendant in this case is what is known in law as a common carrier—a carrier of passengers—and the law places upon such a corporation, a duty of using more than ordinary care for the protection of its passengers. A common carrier of passengers is not an insurer of its passengers; they do not undertake that they will not cause or permit any accident to one of their passengers. But they do undertake, and the law places upon them the

obligation of using the highest degree of care, skill and prudence which human foresight and ingenuity can provide for the safety of their passengers, consistent with the ordinary operation of their line; and this duty applies to passengers, not only while they are upon the bus, and getting upon the bus, and getting off the bus, but it also applies to passengers while they are upon the depot grounds after they have disembarked from the bus, and within such a reasonable time as would enable them to leave the bus." (Emphasis supplied.)

The correct rule of law governing the carrier-passenger relationship after the passenger has completely alighted from the conveyance is that, whether transferring at an intermediate point or at the end of the journey and whether in a public place or otherwise, the carrier's duty to exercise the highest degree of care is suspended until the passenger again presents himself to the carrier's conveyance. The standard of conduct after the passenger has alighted and before he again seeks further passage is limited to that degree of care commensurate with the danger involved. And that is true even though the passenger may still be on depot or terminal grounds. Rotheli v. Chicago Transit Authority, 7 Ill. 2d 172, 177-78, 130 N.E.2d 172, 175; Davis v. South Side Elevated R.R., 292 Ill. 378, 384, 127 N.E. 66, 69; Kiesel v. Chicago Transit Authority, 6 Ill. App. 2d 13, 17-18, 126 N.E.2d 170, 172. The instruction was therefore erroneous. We must next consider whether it was reversible error.

An error having to do with the standard of conduct to be applied by a jury in measuring the duty owed by a defendant is an error of such gravity as to require reversal.

Sims v. Chicago Transit Authority, 7 Ill. App. 2d 21, 26, 129 N.E.2d 23, 25. The language of the instruction, that "...the law places upon them [common carriers] the obligation of using the highest degree of care, skill and prudence which human foresight and ingenuity can provide for the safety of their passengers, consistent with the ordinary operation of their line..." sets such a high standard that it is just short of insurance. It is generally recognized as such. Care must be taken in its application. In the instant case plaintiff was entitled to an instruction of this sort, limiting its application to his being injured while alighting from the bus. He was not entitled to it if he was injured after alighting.

In view of the fact that this case will have to be retried, we shall consider other arguments presented by the parties.

Defendant predicates error upon the court's having refused to give defendant's instruction No. 22, which reads as follows:

"After the plaintiff had alighted from the defendant's car the relation of passengers and carrier ceased to exist between the defendant and the plaintiff; and the Court further instructs the jury as a matter of law that the operator of the bus in question was not required by law to exercise the highest degree of care possible to human diligence to avoid the accident, but the said operator was only required to exercise toward the plaintiff ordinary care, and ordinary care is such care as a person of ordinary prudence would exercise under the same or like circumstances."

The vice of this instruction is that it assumes a fact which

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was for the jury to decide; that is, that plaintiff had completely alighted from the bus at the time of the accident. There was evidence from which the jury could have drawn the inference that plaintiff was still in the process of alighting at the time of the accident. The instruction would not have been objectionable had it taken the form of defendant's instruction No. 16 submitted in Rotheli v. Chicago Transit Authority, supra, at page 174, 130 N.E.2d at page 173, which submits defendant's theory conditioned upon the jury's finding, without deciding for them a fact which it was their duty to decide.

Defendant urges error in the court's having failed to require an instruction governing permissible inferences to be drawn from a mortality table showing life expectancy, which had been offered by plaintiff and was received in evidence. It is argued that plaintiff's physical condition had been impaired by ill health prior to the accident, and that the proposed instruction should have encompassed that material fact. Neither plaintiff nor defendant offered such an instruction. In Avance v. Thompson, 387 Ill. 77, 84, 55 N.E.2d 57, 60 (1944), the Supreme court discussed the effect and use of mortality tables and the probability of confusing a jury in the absence of an instruction concerning the existence of circumstances which might possibly reduce the anticipated loss. The court said that receipt in evidence of such a table without a subsequent explanatory instruction was prejudicial, but was not reversible error.

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An inference could be drawn from the language of the opinion that it was plaintiff's duty to submit such an instruction. Since that case has been decided, however, the rules governing civil practice have been changed substantially. One of the additions made to the rules since 1944 is that "no party may raise on appeal the failure to give an instruction unless he shall have tendered it." Ill. Rev. Stat., ch. 110, sec. 67(3) (1959). We think that rule is applicable to the instant case and that defendant was bound to offer such an instruction if it thought that its absence was prejudicial.

The judgment is reversed and the cause is remanded with directions to allow the motion for a new trial, and for such other and further proceedings as are not inconsistent with the views herein expressed.

Judgment reversed and cause
remanded with directions.

Dempsey, P.J., and McCormick, J., concur.

Abstract only.

47861

PHILIP PEDI,

Plaintiff-Appellee,

v.

STANLEY JAGIENCARZ, AGNES
JAGIENCARZ and HOYNE
SAVINGS & LOAN ASSOCIATION,
a corporation,

Defendants,

STANLEY JAGIENCARZ and
AGNES JAGIENCARZ,

Defendants-Appellants.

APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

25 I.A.^{2d} 467

MR. PRESIDING JUSTICE DEMPSEY DELIVERED
THE OPINION OF THE COURT.

Philip Pedi, a general contractor, brought this action to enforce a mechanic's lien claim arising from erecting a one and one-half story building for Stanley and Agnes Jagiencarz. The case was referred to a master in chancery, who found the issues for the plaintiff. A decree, from which the defendants now appeal, was entered in accordance with the master's recommendations. The defendant, Hoyne Savings and Loan Association, is not involved in this appeal.

The complaint alleged fulfillment of a written contract, and oral agreements for extra work, and the defendants' failure to pay the balance due of \$13,004.44. The defendants denied that the work had been completed and the materials supplied as agreed upon; they alleged defects and deficiencies in the work performed, and that

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the oral agreements were not additions to, but were substitutions for, other items in the written contract.

The defendants filed a counterclaim consisting of two counts. The first count alleged that the plaintiff's failure to comply with the contract had necessitated additional expenditures. The second count sought damages for loss of rental resulting from the plaintiff's wrongful withholding of possession of the building.

Many of the points raised by the defendants concern the findings of the master on questions of fact. They contend that the master erred in not finding that the contractor's claim was so far in excess of the amount to which he was entitled, that it constituted a fraud which should bar his lien. The fraud alleged is that the lien is based on full performance of the contract, despite the contractor's knowledge that there were deficiencies in constructing a concrete outside stairway and in plastering the basement. They contend that the proof was insufficient to support the master's finding that Pedi was to have been compensated, over and above the contract, for doing extra work. The testimony concerning the many items in dispute was so sharply conflicting that it would serve no purpose in detailing it. But from our examination of the record we are of the opinion that there was ample evidence to support the findings of the master about the work performed under both the written and oral agreements. In reference

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to the alleged fraud, the record does not support the defendants' contention; it does not reveal unfounded charges nor wilful deviation from the plans and understandings. In reference to the extra work, the changes in the plans were of such a substantial nature as to have led to, if not compelled, the conclusion that they could not have been intended to have been made gratuitously. The master's findings were approved by the chancellor and the record does not justify our disturbing their conclusions. Klass v. Hallas, 16 Ill. 2d 161, 166, 157 N.E.2d 261, 264; Schmitt v. Heinz, 5 Ill. 2d 372, 381, 125 N.E.2d 457, 461; Rizzo v. Rizzo, 3 Ill. 2d 291, 120 N.E.2d 546; Meier v. Triebold, 21 Ill. App. 2d 390, 158 N.E.2d 93; Oppenheimer Bros., Inc., v. Joyce & Co., 20 Ill. App. 2d 34, 154 N.E.2d 856.

We disagree with the defendants' position in all but four of their many remaining points. These concern a finding under count II of the counterclaim, the form of the judgment, the form of the master's report and the size of his fee.

Count II of the counterclaim was for wrongful interference by the plaintiff with the defendants' possession of their building after it had been completed. The defendants assert that they were entitled to nominal damages, if not actual damages for loss of rentals, and that under these circumstances they should not have been assessed with all of the master's costs, fees and expenses. The plaintiff admitted that he refused to deliver possession, but claimed he was entitled to do so by reason of the defendants' failure to pay him the balance of monies due.

It is true that Pedi came upon the defendants' property with permission; however, one who exercises such a privilege in an unreasonable manner commits a trespass and is subject to liability for any harm he causes to a legally protected interest by reason of such unreasonable conduct. Restatement, Torts sec. 214(1) and comments thereto. See also Western Book & Stationery Co. v. Jevne, 179 Ill. 71, 53 N.E. 565. There is nothing in the Mechanic's Lien Act, ch. 82, sec. 1 et seq., Ill. Rev. Stat. 1959, which authorizes a contractor to withhold possession of premises from the owner for nonpayment of a balance due, and we know of no rule of law which permits such conduct. Holding, as we do, that the master incorrectly concluded that there was no illegal or wrongful withholding of possession of the premises from the defendants, it follows that his finding upon the issue of damages was also in error. There must be a new finding upon the damage issue, even if the damages were nominal, and based upon such finding the costs, fees and expenses should be equitably distributed between the parties. Ill. Rev. Stat. ch. 82, sec. 17 (1959).

The decree provided for a deficiency judgment against both Stanley and Agnes Jagiencarz. The evidence shows that Agnes neither signed the contract nor negotiated with the plaintiff regarding the extra work. The contract attached as an exhibit reveals only Stanley Jagiencarz' signature as owner of the property. Although the pleadings admitted that both had signed the contract, thus conflicting

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with the exhibit, it is well settled that if there is any contradiction between allegations in the pleadings and facts shown in an attached exhibit, the exhibit will control.

W. P. Iverson & Co. v. Dunham Mfg. Co., 18 Ill. App. 2d 404, 425, 152 N.E.2d 615, 625. While the wife was a proper party defendant, she did not become personally liable for the debt and there is no evidence which would sustain a personal deficiency judgment against her. Crowen v. Meyer, 342 Ill. 46, 55, 174 N.E. 55, 59.

The report of the master has been subjected to two criticisms. It is charged that the report was unnecessarily expanded by including a summary of the pleadings and an abstract of the testimony, thereby increasing the size of the fee, which is objected to as being excessive. The master's report devotes four pages to the pleadings and 29 pages to the testimony. A comparison between the report and the transcript shows that, taking into consideration the type, the spacing and the number of words to a page, there is little difference between the two. It appears as if the questions and the repetitive answers are eliminated in the report but otherwise it is close to being a duplication of the transcript. The master was probably trying to be helpful to the chancellor by presenting the testimony in a more narrative form, but his consideration unduly lengthened his report and the time consumed in its preparation.

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The report showed that he spent 58-1/4 hours on the case. His fees were fixed at \$35.00 per hour which, with the statutory fees, amounted to \$2,114.95. Although the conflicting testimony must have caused the master much difficulty, the issues in a mechanic's lien foreclosure case, such as this, are not complicated. Chicago Art Marble Co. v. A. Smith & Co., 304 Ill. App. 582, 26 N.E.2d 703. A master's fee should be based upon the complexity of a case, its problems of law and fact and the time required in the preparation of his report. But it has been held repeatedly that his daily fee should not, under any circumstances, equal the daily compensation of the chancellor who appointed him. Handelman v. Arquilla, 407 Ill. 552, 560, 561, 95 N.E.2d 910, 915, 916; Kerner v. Peterson, 368 Ill. 59, 12 N.E.2d 884; Strom v. Strom, 13 Ill. App. 2d 354, 361, 142 N.E.2d 172, 175-176. Under this long established rule it is apparent that the master's fee of \$35.00 per hour must be substantially reduced.

It is necessary to remand this case to assess whatever damages resulted from the building being withheld from the defendants, to reapportion the costs between the parties, to amend the judgment, and to readjust the fees of the master.

Affirmed in part, reversed in part, and cause remanded with directions.

Schwartz and McCormick, JJ., concur.

Abstract only.

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and the State's Attorney agreed to do so. Evidence was then presented.

It appears that a policeman saw defendant driving a black Thunderbird convertible and weaving in and out of traffic. He curbed defendant and questioned him. Defendant was unable to produce a license or other identification for the car. Examination revealed that the keys were not in the ignition slot. The motor had been started by a wire connected to the battery and coil. Defendant explained that he got the car from a man named Charlie on Madison Street. He never explained why there were no keys in the ignition slot. The owner of the car testified he had parked it in front of his home; that when he went to look for it at 10:00 o'clock in the evening, it was gone; that he did not know defendant and never gave him permission to touch or drive the car, nor did he leave the keys in the ignition slot.

It appears that defendant had a previous record of larceny of an automobile in 1950. The court told defendant it was willing to accept a plea to a reduced charge if defendant desired so to plead. Defendant said he would plead guilty. The court advised him that on such a plea the court could send him to jail for up to a year. Nevertheless, defendant still wished to plead guilty. Thereupon, it was stipulated that the evidence theretofore heard would be the same heard in connection with the charge of tampering, and defendant was sentenced, as

stated. It is clear that defendant's right to counsel was not violated.

Defendant also makes the point that the Municipal Court of the City of Chicago was without jurisdiction to try a felony case, to-wit: larceny of a car. The evidence which was heard was on the question of whether defendant should be held to the grand jury, and not on a trial for larceny. When defendant pleaded guilty, the proceeding to hold him to the grand jury was abandoned and the evidence heard therein was stipulated to apply to the charge of tampering, a misdemeanor of which the Municipal Court had jurisdiction. There is no merit therefore to this point.

The third point made by defendant appears to be fully covered in our consideration of the other points.

Judgment affirmed.

Dempsey, P.J., and McCormick, J., concur.

Abstract only.

47746

MIDLAND SPORTING GOODS COMPANY,
INC., a corp.,

Appellee,

v.

JOHN B. FERGUSON, PHIL TEITELBAUM
and VOEDISCH BROS., INC., a corp.,

Defendants below,

On Appeal of VOEDISCH BROS., INC.,
a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

25 1A 2d 477
See Rehearing

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying defendant's motion to open a judgment entered by confession on a promissory note.

Plaintiff and defendant are corporations engaged in the wholesale sporting goods business. The note in issue was the fifth of six promissory notes authorizing confession of judgment made by defendant payable to plaintiff under a contract for the sale of plaintiff's complete inventory to defendant. Defendant paid the first four notes, and judgment on this fifth note, due June 10, 1958, was entered August 26, 1958, for its \$14,000 face value and \$782.50 costs.

The question is whether defendant's motion to open set forth a meritorious defense to the whole or part of payment of the note. Municipal Court Rule 2, sec. 23(2); Lietz v. Ankrom, 350 Ill. App. 437.

Defendant moved, under Municipal Court Rule 2, sec. 23, to open this judgment September 30, 1958, and, after certain agreed amendments in the judgment and motion to open, defendant was permitted to file an amended affidavit supporting its motion to open. This motion alleged several "meritorious defenses" to the note, among others, fraudulent inducement to enter the contract. Defendant's subsequent second amended motion to open, with supporting affidavits, summarized the history of the case and particularized the "meritorious defense" of fraudulent representations of Landsman, plaintiff's president, concerning the state of the inventory.

The original affidavit filed on defendant's behalf raised a number of "defenses," including fraud; the amended motion and affidavits merely set forth in detail the facts constituting the alleged fraud. It is evident to us that this amendment was not intended totally to supersede the earlier motions and affidavits, but was merely meant to elaborate on a general allegation made earlier. *Rothenberg v. Seifried*, 322 Ill. App. 701. We shall therefore treat the original and amended motions and accompanying affidavits as one motion.

The statements relied upon for the defense of fraud are set forth in the affidavits supporting defendant's second amended motion. The statements are that before the contract was made Ferguson and Teitelbaum, officers of defendant corporation, questioned Landsman about the condition of the goods to be sold and Landsman said everything "was brand new merchandise,

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was not damaged, was not shopworn, was not obsolete and was marketable," and that none of the merchandise had been on plaintiff's premises during a recent fire; that thereafter both Ferguson and Teitelbaum told Landsman that defendant's stockholders were "seriously concerned" about the goods and Landsman stated that everything in the inventory had been purchased since the fire and was "brand new," "the most recent model," and in "perfect, new, marketable condition"; that subsequently Landsman's statements were repeated in a conference in defendant's attorney's presence; that the goods were packed in "thousands upon thousands of individual cartons," most of which were sealed, and to examine each and every article would have been time consuming and expensive; and that defendant examined plaintiff's premises and "the merchandise" and thereafter upon the representations of Landsman made the contract.

Thereafter, according to the affidavits, the goods were delivered in 67 truckloads in December, 1957, and in the latter part of March, April and May, large quantities were shipped to defendant's customers. The statements are then made that defendant received letters, telegrams, personal and telephone calls from customers; that defendant was "forced to make adjustments" in price on "many invoices"; that defendant then "caused a closer inspection" of the goods remaining and found a "great quantity ... obsolete, damaged, worn and not marketable"; that Landsman knew the condition of the goods and deliberately and falsely misrepresented their condition with intent to deceive affiants into

executing the contract and notes; that affiants relied upon the misrepresentations and "could not have possibly known of the condition of the merchandise" until the customers opened the boxes sent out by defendant; and finally that defendant was damaged as a result of its reliance since the reasonable value of the goods delivered was considerably less than the contract price.

Plaintiff argues that the affidavits do not comply with the rules of the Municipal Court. Under Municipal Court Rule 2, secs. 15(1), 23(2), affidavits in support of a motion to vacate should set forth facts admissible in evidence to which the affiant could testify. We think the affidavits, except for some hearsay statements, meet these requirements. Both affiants had personal knowledge of the alleged misrepresentation, the fact that there were customer complaints and that they had to make adjustments, the inspection and its results, and the damage allegedly caused by reliance on the misrepresentation. All of this is admissible as evidence.

We think defendant's affidavits set forth prima facie a meritorious defense of fraud. The essentials of the defense are representation of a material fact, falsity, scienter, deception and injury. *Lowe Foundation v. Northern Trust Co.*, 342 Ill. App. 379. Here the alleged misrepresentation went to the condition and quality of the merchandise to be sold which, under the circumstances, reflected its value and was an inducement for defendant to buy. It was not an opinion or a salesman's "puffing," *Scott v. Wilson*, 15 Ill. App. 2d 456, but an alleged misrepresentation of an existing fact, known by Landsman, the

truth of which "seriously concerned" the officers of defendant before the contract was signed. It was therefore material. Thorne v. Prentiss, 83 Ill. 99. See Howe Machine Co. v. Rosine, 87 Ill. 105; Annotation, 104 A.L.R. 551 (1936). On the issue of damages, the affiants stated that in their opinion the reasonable value of the goods was \$50,000 less than the contract price. Under the circumstances in this case, we think this is sufficient to support a meritorious defense of fraud on a motion to open. Defendant can present further proof of damages at trial and plaintiff will have the opportunity of rebutting the evidence. The affidavits allege sufficient facts to meet the other essentials, about which no questions have been raised.

Plaintiff next contends that the facts stated in the affidavits merely allege prior oral statements which vary and contradict the express terms of the written contract and are therefore inadmissible under the parol evidence rule. The parol evidence rule is inoperative to a defense of fraud, Lehman v. Hill, 414 Ill. 173, and plaintiff's cited cases regarding the rule are therefore distinguished and inapplicable.

Plaintiff's final contention is that defendant has waived any claim of fraud by its failure diligently to notify plaintiff of the alleged fraud. The cases cited by plaintiff to support its contention do not involve motions to open or vacate judgments. The rule in this state is that one who has been defrauded must use reasonable diligence to disaffirm the

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contract. Richter v. Schuett, 314 Ill. 127. In the case before us, however, we think this is a matter of rebutting the evidence of fraud. We cannot decide as a matter of law on the affidavits that defendant has waived the fraud.

We need decide no other points. The order is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

MURPHY, P.J. CONCURS.

BURMAN, J., NOT PARTICIPATING.

ABSTRACT ONLY.

47746

MIDLAND SPORTING GOODS COMPANY, INC.,
a corp.,

Appellee,

v.

JOHN B. FERGUSON, PHIL TEITELBAUM and
VOEDISCH BROS., INC., a corp.,

Defendants below,

On Appeal of VOEDISCH BROS., INC., a
corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

25 I.A.^{2d} 477²

ON REHEARING.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying defendant's motion to open a judgment entered by confession on a promissory note.

Plaintiff and defendant are corporations engaged in the wholesale sporting goods business. The note in issue was the fifth of six promissory notes, authorizing confession of judgment, made by defendant payable to plaintiff under a contract for the sale of plaintiff's complete inventory to defendant. Defendant paid the first four notes, and judgment on this fifth note, due June 10, 1958, was entered August 26, 1958, for its \$14,000 face value and \$782.50 costs.

The question is whether defendant's motion to open set forth a meritorious defense to the whole or part of payment of the note. Municipal Court Rule 2, sec. 23(2); Lietz v. Ankrom, 350 Ill. App. 437.

Defendant moved, under Municipal Court Rule 2, sec. 23, to open this judgment September 30, 1958, and, after certain agreed amendments in the judgment and motion to open, defendant was permitted to file an amended affidavit supporting its motion to open. This motion alleged several "meritorious defenses" to the note, among others, fraudulent inducement to enter the contract. Defendant's subsequent second amended motion to open, with supporting affidavits, summarized the history of the case and particularized the "meritorious defense" of fraudulent representations of Landsman, plaintiff's president, concerning the state of the inventory.

The original affidavit filed on defendant's behalf raised a number of "defenses", including fraud; the amended motion and affidavits merely set forth in detail the facts constituting the alleged fraud. It is evident to us that this amendment was not intended totally to supersede the earlier motions and affidavits, but was merely meant to elaborate on a general allegation made earlier. *Rothenberg v. Seifried*, 322 Ill. App. 701. We shall therefore treat the original and amended motions and accompanying affidavits as one motion.

Defendant lists five alleged "meritorious defenses" to the note. The first is that plaintiff refused to supply the necessary invoices so that an inventory evaluation could be made to ascertain the contract. He alleges that this was a condition precedent to full payment and plaintiff's failure to perform violated the terms of the contract. We agree that the

inventory will have to be completed prior to full payment. This was the contemplation of the parties manifested by the written memorandum on the sixth and last note: "Subject to the final accounting of inventory." However, this does not make delivery of the invoices a condition precedent to payment of the fifth note. The parties stipulated in the contract that the installment notes be paid on a certain date. The only divergence from this agreement was the notation on the sixth note, making it, and it only, conditionally delivered.

In *United Manufacturing Co. v. Mitchell Novelty Co.*, 342 Ill. App. 201, the court opened a judgment by confession because the petition presented a defense of accord and satisfaction to the notes. There is no such allegation here. In *Albany v. Phillips*, 318 Ill. App. 642, none of the consideration for the note had passed prior to judgment by confession, and the court held the defendant was not obligated to pay until the consideration had passed, thus construing the consideration as an implied condition. There is no such condition here. In *Great Northern Store Fixtures Mfg. Co. v. Lamm*, 324 Ill. App. 587, the note involved was security for the contract which expressly stipulated the note was not to be "confessed upon except upon full ... performance of the terms of the contract." The court held that the note was delivered conditionally and since the condition, complete performance of the contract, had not been performed, the judgment would be opened. There is no such stipulation in the instant contract. None of the defenses in these cases are applicable to this case.

The second defense is that plaintiff fraudulently represented the goods transferred by the contract, resulting in damage to plaintiff. However, the only allegation of damages in the affidavits accompanying the petition is the affiants' opinion that the reasonable value of the goods transferred does not exceed \$70,000 and therefore defendants were damaged in the sum of \$50,000. There is no statement supporting this claim other than the verified "opinion" of the affiants, officers of defendant corporation. This does not meet the specifications of the Supreme Court rules or Municipal Court Rule 2, secs. 23 and 15, which require affidavits supporting petitions to open judgments by confession to be of such particularity as to warrant the entry of a summary judgment. Chapin v. Raven, 23 Ill. App. 2d 512. The instant affidavits lack a specific allegation of damages to support the defense of fraud.

Plaintiff's third alleged defense is that he violated clause 5(b) of the contract which contains an explicit condition to furnish defendant with a certified list of liabilities prior to payment and that "no additional payments are to be made" under the agreement until "said liabilities shall be less than the unpaid balance due hereunder." But by express terms of the clause the only condition to payment is that the liabilities be less than the unpaid balance. The certified list would have assured defendant of this conclusion, but is not a condition for payment until defendant is informed by creditors of the amount of the liability. Defendant has not alleged that the liabilities exceed the unpaid balance. Consequently, the defense fails.

The fourth and fifth defenses allege breaches of a restrictive covenant within the contract and breach of an employment agreement alleged to be part of the consideration of the sales contract. The restrictive covenant requires plaintiff and Landsman, officer and principal stockholder of plaintiff, to refrain from conducting business similar to plaintiff's for three years within a radius of two hundred miles of Chicago, Illinois. The employment agreement requires Landsman to devote all his time and energy to the service of plaintiff as a salesman.

But neither of these breaches is a failure of consideration for the sales contract since the promise of Landsman to perform or refrain from performing an act in the future is the consideration. The consideration does not fail from the non-performance of the act. *Vella v. Pour*, 329 Ill. App. 355; *Smysor v. Glasscock*, 256 Ill. App. 29; *Gage v. Lewis*, 68 Ill. 604.

The breaches of both promises could form a valid counterclaim. Although under the Supreme Court Rules, this is insufficient to open a judgment by confession, Ill. Rev. Stat., ch. 110, sec. 101.23 (1959), the Municipal Court Rules applicable to this case differ somewhat. Under Rule 2, sec. 23(3), if the affidavit conforms in specificity with section 15 and does not disclose a defense, but discloses a counterclaim against the plaintiff, the court may permit the filing of the counterclaim and stay all proceedings on the judgment by confession until the counterclaim is disposed of. The language of the rule makes the stay permissive and therefore discretionary with the trial court.

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In its decision here the trial court apparently was not disposed to accept the breaches of both agreements as counterclaims to stay the judgment. We see no reason to disturb his decision.

For the reasons given the order is affirmed.

AFFIRMED.

MURPHY, P. J. CONCURS.

BURMAN, J. NOT PARTICIPATING.

ABSTRACT ONLY.

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Gen. No. 11251

2nd DIVISION
Agenda 1

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
OCTOBER TERM, A. D. 1959

FILED

18 1961

PAUL V. WUNDER
Clerk Appellate Court Second District

LILBERN W. LEDBETTER,
Plaintiff-Appellant,

-vs-

MARY B. LEDBETTER,
Defendant-Appellee.

Appeal from the
Circuit Court of
Lee County.

25 I.A.^{2d} 478

CROW, J.

This is an appeal by the plaintiff-appellant, Lilbern W. Ledbetter, from an order of the Circuit Court of Lee County denying his petition for modification of a decree for divorce so as to award him the sole custody of his minor child, Robert, age 7 years. The plaintiff-appellant and defendant-appellee, Mary B. Ledbetter, had been divorced July 3, 1956, in that Court, the husband obtaining the divorce on the grounds of extreme and repeated cruelty, with the decree awarding the custody of their son, Robert W. Ledbetter, then age 5 years, to the defendant, and the plaintiff was therein ordered to pay \$30.00 per month to the defendant for the support of the minor child. On July 21, 1958 the plaintiff father filed a verified petition seeking sole custody of the child, alleging, in substance, so far as material, that both parties had been re-married, the defendant mother was an unfit person to have the

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STANDARD OF TOWN QUALITY
NATIONAL BUREAU OF THE CITY OF NEW YORK
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There is no appeal by the plaintiff-appellant, William W. Jackson, from an order of the Circuit Court in the above captioned case granting his petition for writ of habeas corpus. The plaintiff-appellant and defendant-appellee, Mary E. Jackson, had been divorced July 2, 1930, in said court, the husband retaining the custody of the persons of children and support thereof, and the divorce having been made absolute of their son, Robert E. Jackson, then six years of age, and the plaintiff was shortly ordered to pay \$10.00 per month to the defendant for the support of her child. On May 27, 1932 the plaintiff again filed a petition for writ of habeas corpus and motion for judgment, alleging that petition seeking sole custody of the child, William, as defendant, so far as material, that both parties had two sons, the defendant's son and an older person in that the

care and custody of the minor child, for several reasons allegedly occurring since the decree of divorce, he and his present wife desired to have the child, and they have a proper and suitable home for rearing the child. On the same day, July 21, 1958, the defendant mother, Mary B. Ledbetter, filed a verified petition for a rule on the plaintiff to show cause why he should not be held in contempt of court for failure to pay the sum of \$540.00 alleged past due support money for the minor child, and for a judgment for the unpaid child support money, and for a writ of habeas corpus, because he has detained and unlawfully restrained the child of his liberty, without authority of Court. There were no answers to either petition. The two petitions were consolidated for trial and after a hearing, at which evidence was taken, an order was entered July 28, 1958 in effect modifying the previous decree for divorce, so as to grant the custody of the child to a Mr. and Mrs. John Kerley, of West Frankfort, Illinois, give certain qualified visitation rights to both the plaintiff and defendant, and direct the plaintiff to pay \$25.00 per month child support to Mr. and Mrs. Kerley. The plaintiff father appeals therefrom. There is no cross appeal by the defendant mother.

The order of July 28, 1958 of modification of the decree is as follows:

" O R D E R

Now this matter having come on to be heard upon the petitions of the plaintiff and the defendant, and the Court having heard the testimony and being fully advised in the premises, finds:

1. The Court has jurisdiction of the subject matter and of the parties.

"2. That it is for the best interest of Robert W. Ledbetter, minor child of the parties that he continue residing in the home of Mr. and Mrs. John Kerley with whom he has been residing since November, 1957.

WHEREFORE it is ordered, adjudged and decreed:

1. That Robert W. Ledbetter, minor child of the parties, be and he is hereby placed in the custody of Mr. and Mrs. John Kerley of West Frankfort, Illinois.

2. That both parties shall have the right to visit said child at such times, places and for such periods of time as shall be agreeable to the said Mr. and Mrs. John Kerley.

3. The plaintiff is directed to pay the sum of Twenty-five Dollars (\$25.00) per month to the said Mr. and Mrs. John Kerley for the support of the said Robert W. Ledbetter; first payment to be made August 1, 1958, of \$12.50 and semi-monthly thereafter.

4. That the temporary injunction heretofore entered be and the same is hereby dissolved.

5. The Court retains jurisdiction of the subject matter and of the parties."

From the date of the divorce decree of July 3, 1956 until Thanksgiving Day of 1957, the minor child of the parties lived with the defendant mother. On or about Thanksgiving Day, 1957, the defendant took the child to West Frankfort, Illinois for him to live with her sister, Mrs. John Kerley, and the sister's husband, Mr. Kerley. That was done without the knowledge of the plaintiff and when he learned thereof he objected and requested the defendant give him the child and he'd send him to school. On July 15, 1958, the child was returned to Dixon by the defendant to visit the plaintiff. Later the plaintiff refused to return the child to the defendant and the foregoing petitions were filed shortly afterwards. There was some evi-

1. That it is the policy of the Board of Education to maintain the highest standards of the public schools of the City of Chicago and to provide for the best possible education for all children.

2. That the Board of Education is authorized to adopt such rules and regulations as may be necessary to carry out its policy.

3. That the Board of Education is authorized to appoint and remove such officers and employees as may be necessary to carry out its policy.

4. That the Board of Education is authorized to appropriate such funds as may be necessary to carry out its policy.

5. That the Board of Education is authorized to do all such other acts and things as may be necessary to carry out its policy.

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10. That the Board of Education is authorized to do all such other acts and things as may be necessary to carry out its policy.

11. That the Board of Education is authorized to do all such other acts and things as may be necessary to carry out its policy.

dence reflecting on the fitness of the defendant mother to have custody of the child, which need not at present, under the circumstances, be set forth in detail. She evidently resided in or near Dixon during the material times. The plaintiff resided in Dixon at the material times, was remarried shortly after the divorce, had one child by the second wife, was expecting another, lived in a rented house, and was gainfully employed. Mr. and Mrs. John Kerley were not parties to this cause, nor witnesses, nor were they physically present at the hearing. The witnesses for the defendant were herself, Gordon L. Smith, her employer, Maxine Troy, a friend who sometimes took care of the child here concerned, and the plaintiff as an adverse witness. The witnesses for the plaintiff were himself, Mary A. Ledbetter, his second wife, Floyd Green, the defendant's second husband, Louise Welty, the defendant's former superior at Dixon State School, where she formerly worked, John Boward, the plaintiff's employer, the defendant as an adverse witness, and James Owens, Captain of the Sterling Police Department.

In a separate statement of "Reasons for Order", filed by the trial court contemporaneously with the entry of the order of July 28, 1958 from which this appeal is taken, there are, among others, the following comments:

" * * * There is more than meets the eye in this case, which is so often the fact with warring parents over the custody of a child. * * * "

"The Court personally talked with the child, Robert Ledbetter with the consent of both counsel and as a result of the conversation ascertained that the child had been well treated and carefully looked after by his aunt and her husband during all of the time that he was with them at West Frankfort, Illinois. He attended school and told the Court that his aunt and uncle were kind to him and that he was more than reasonably satisfied with his home except that up

James of the British Police Department.

In a number of cases, it was found that the same person had been employed by the same firm at different times, and in some cases, the same person had been employed by different firms at the same time.

The Court respectfully stated that the Court is not
 bound by the decision of the Court of Appeals in the
 case of *United States v. Smith*, 100 F.2d 100, 101,
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here in Dixon where he had been with his father for a short time, he found more children to play with and he liked that. He further told the Court he would have no objection to going back with his aunt.

The Court also talked with Wayne Ledbetter and explained to him that in view of all of the circumstances the Court was of the opinion that it thought the child would be better off with his aunt. During that conversation Wayne Ledbetter told the Court that his wages had been increased, as the Court recalls it, \$15.00 a month and during the conversation the Court told Mr. Ledbetter that it, the Court, was of the opinion that it would send the child back with the aunt, for it believed he would be better off there than here in view of the fact that he had one child a little over a year old and his wife was going to have another child within a short time, and to add a third child for his wife to look after would not add much to her peace of mind. The Court told Mr. Ledbetter it was going to direct him to pay the aunt \$25.00 a month and that owing to the fact his wages had been raised \$15.00 a month, it was only going to cost him \$10.00 a month more and the child would have a good home. The Court further explained to the father, moving the custody into the aunt was not necessarily forever, but that if and when conditions might change it would talk about it again. Mr. Ledbetter agreed to this and said as near as the Court can remember, 'I guess that will be all right.'

The Court talked with Mr. and Mrs. John Kerley and from its conversation with them was thoroughly satisfied that the child would get good care and would have proper supervision with his aunt. * * * *

" * * * The most redeeming feature about the child's mother is, that she appeared to be conscious that her son about five years old was not getting proper care in her possession and that is the reason she took him to her sister. The Court was of the opinion she was very unstable and should not have the custody. There was considerable talk about her use of intoxicating liquor and her association with various men. * * * * * "

"After talking to the child, hearing the mother and father testify, talking to the father and talking to the mother and Mrs. John Kerley, the Court has not the slightest doubt but that the best interest of the child is served by placing the custody in Mrs. John Kerley, the mother's sister, until the further order of this Court."

There is practically no competent evidence in the record as to Mr. and Mrs. John Kerley except that Mrs. Kerley is

There is also a small building on the corner of the lot, which is used for storage of lumber and other materials. The building is made of wood and is in good condition. It is located on the corner of the lot, and is a small, single-story building. It is used for storage of lumber and other materials. The building is made of wood and is in good condition. It is located on the corner of the lot, and is a small, single-story building. It is used for storage of lumber and other materials.

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have proper supervision and control. * * *

1. The above information was obtained from the files of the FBI, New York Office, and is being furnished to you for your information. It is not to be used for any other purpose.

"The first thing I noticed when I stepped
 out of the car was the smell of the sea.
 It was a fresh, salty breeze that
 carried with it the promise of a new
 beginning. I had heard so much about
 the island, but now it was real. The
 sun was shining brightly, and the
 water was a deep, inviting blue.
 I took a deep breath and felt a sense
 of peace that I had never experienced
 before. This was my chance to start
 over, to leave behind all the troubles
 of the past and embrace a future full
 of hope and possibility."

There is practically no comparison between the two
and as far as the other things which are mentioned in the text

the defendant's sister, they live at West Frankfort, they have no children of their own, the child here concerned had been living with them and going to school, during the time above indicated, they took him to the dentist, paid his doctor bills, and gave him polio shots. There is nothing in the record to indicate any consent by counsel for the plaintiff and defendant to the Court's personally talking with the child here concerned. Nor is there anything in the record as to what the child or Court said in that talk. There is nothing in the record to indicate any talk by the Court with the plaintiff, or any consent by counsel for the parties to the Court's personally talking with the plaintiff, or what the plaintiff or Court said in that talk, or that the plaintiff agreed to the awarding of custody to Mr. and Mrs. Kerley. There is nothing in the record to indicate any talk by the Court with Mr. and Mrs. Kerley, or any consent by counsel for the parties to the Court's talking with Mr. and Mrs. Kerley, or what they or the Court said in that talk. There is nothing to indicate any talk by the Court with the defendant mother, or any consent by counsel for the parties to the Court's talking with the defendant, or what the defendant or Court said in that talk.

The plaintiff in his post trial motion, which was denied, in addition to other points, asserted that the order is erroneous because it is based in whole or in part upon matters not presented in open court. We agree.

The Divorce Act, CH. 40, ILL. REV. STATS., 1959, par. 19, provides, in part, so far as now material, that:

the defendant's attorney, and, like all other witnesses, they have no objection to their own. The child here testified that from living with her and going to school, during the time above referred to, they took him to the hospital, said his doctor killed, and gave him false shots. There is nothing in the record to show any consent by counsel for the plaintiff and defendant to the Court's personal calling with the child his statements, and is there anything in the record as to what the child in Court said to that effect. There is nothing in the record to indicate any talk by the Court with the plaintiff, or any consent by counsel for the parties to the Court's personal calling with the plaintiff, or with the plaintiff or Court with the child, or that the plaintiff agreed to the hearing of evidence in the Court. There is nothing in the record to indicate any talk by the Court with Mr. and Mrs. Taylor, or any consent by counsel for the parties to the Court's calling with Mr. and Mrs. Taylor, or with any of the Court with Mr. and Mrs. Taylor. There is nothing to indicate any talk by the Court with the defendant, or any consent by counsel for the parties to the Court's calling with the defendant, or with the defendant or Court with the child.

The plaintiff in his post trial motion, which was filed in addition to other points, asserted that the order is erroneous because it is based in whole or in part on errors not presented to the jury. He stated:

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10. Provided, That the said act, or any part thereof, shall not be construed to require the payment of any fee or charge for the use of the same.

"When a divorce shall be decreed, the court may make such order touching the alimony and maintenance of the wife or husband, the care, custody and support of the children, or any of them, as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just. * * * * * Irrespective of whether the court has or has not in its decree made an order for the payment of alimony or support, it may at any time after the entry of a decree for divorce, upon obtaining jurisdiction of the person of the defendant by service of summons or proper notice, make such order for alimony and maintenance of the spouse and the care and support of the children as, from the evidence and nature of the case, shall be fit, reasonable and just, * * * * * * * * . The court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children, as shall appear reasonable and proper."

The Civil Practice Act, CH. 110, ILL. REV. STATS., 1959,
par. 50, provides, in part, so far as now material, that:

"(1) The court shall determine the rights of the parties and grant to any party any affirmative relief to which he may be entitled on the pleadings and proofs. * * * * *

Alterations in the custody of a child in a divorce case may be made, from time to time, if new, material facts, circumstances, and conditions affecting the welfare of the child have arisen since the decree or last prior order which make it necessary for the welfare of the child that the custody be changed, the welfare of the child being preeminently the thing to be considered, together with all other relevant facts and circumstances including the relative positions of those contending for custody, their rights, if any, to custody, their fitness to have custody, their circumstances as to ability to provide the necessities and administer to the requirements of the charge, whether they have forfeited any rights, if any, to custody they may have,

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The above information was obtained from the files of the FBI, New York City Office, dated 10/10/68.

Allegation in the custody of a child in a divorce case may be made, from time to time, in new, material facts, circumstances, and conditions affecting the welfare of the child have arisen since the divorce or law, that order which was made in favor for the welfare of the child that the custody be placed in the hands of the child's mother; consequently the right to be exercised, together with all other relevant facts and circumstances including the relative positions of those participating for custody, that right, it may, in custody, their fitness to have custody, their circumstances as he ability to provide the necessities and shelter to the upbringing of the child, whether they have changed and others, it may be made that the child

whether the welfare of the child demands that one otherwise having a right to custody should be deprived of it, any legal presumptions there may be as to fitness and right to custody, and the burdens of proof as to fitness or forfeiture of right: ISRAEL v. ISRAEL (1955) 8 Ill. App. (2) 284; CORMACK v. MARSHALL (1904) 211 Ill. 519; SULLIVAN v. PEOPLE ex rel. (1906) 224 Ill. 468; STAFFORD v. STAFFORD (1921) 299 Ill. 438; PEOPLE ex rel. v. HOXIE (1912) 175 Ill. App. 563; KENT v. KENT (1942) 315 Ill. App. 284; SZEWczyk v. SZEWCZYK (1943) 320 Ill. App. 562; SCOTT v. ASHCRAFT et al. (1950) 342 Ill. App. 33; BUSH v. BUSH (1950) 342 Ill. App. 86; HORN v. HORN (1955) 5 Ill. App. (2) 346; WOHLFORD v. BURCKHARDT et al. (1906) 141 Ill. App. 321.

But such may only be done "on application", meaning on some kind of pleading presenting the matter to the Court, and only such alterations "as shall appear reasonable and proper" may be made, meaning as shall so appear, in the normal course of judicial proceedings, from the evidence. The order on such application for an alteration in custody, by analogy to the prior parts of the above paragraph of the Divorce Act, must be such as from the circumstances of the parties, the nature of the case, and the evidence shall be fit, reasonable, and just: CH. 40, ILL. REV. STATS.. 1959, par. 19. And that order, as any judgment or decree, should determine the rights of the parties and grant to any party any affirmative relief to which he may be entitled on the pleadings and proofs: CH. 110, ILL. REV. STATS.. 1959, par. 50.

In matters of this nature the trial court is clothed with a wide discretion, but that discretion is a sound judicial discretion and may be reviewed; as to questions of fact,

whether the subject of the writ should be granted or not, and the court is to be guided by the facts of the case and the evidence presented to it.

1. Writ of Habeas Corpus - This writ is granted to a person who is detained in custody without lawful authority. It is a writ of right, and it is not subject to the discretion of the court. It is granted as of course, and it is not subject to the discretion of the court.
2. Writ of Certiorari - This writ is granted to a person who is detained in custody by a lower court or tribunal. It is a writ of right, and it is not subject to the discretion of the court. It is granted as of course, and it is not subject to the discretion of the court.
3. Writ of Prohibition - This writ is granted to a person who is detained in custody by a lower court or tribunal. It is a writ of right, and it is not subject to the discretion of the court. It is granted as of course, and it is not subject to the discretion of the court.
4. Writ of Mandamus - This writ is granted to a person who is detained in custody by a lower court or tribunal. It is a writ of right, and it is not subject to the discretion of the court. It is granted as of course, and it is not subject to the discretion of the court.

The writ of Habeas Corpus is a writ of right, and it is not subject to the discretion of the court. It is granted as of course, and it is not subject to the discretion of the court. The writ of Certiorari is a writ of right, and it is not subject to the discretion of the court. It is granted as of course, and it is not subject to the discretion of the court. The writ of Prohibition is a writ of right, and it is not subject to the discretion of the court. It is granted as of course, and it is not subject to the discretion of the court. The writ of Mandamus is a writ of right, and it is not subject to the discretion of the court. It is granted as of course, and it is not subject to the discretion of the court.

I, the undersigned, do hereby certify that the facts stated in the foregoing are true and correct.

we will not substitute our findings of fact for those of the trial court based upon the statements of witnesses whom the trial court saw and heard testify, the trial court being aided by its normal opportunity to view the witnesses as they testified, unless the order is clearly against the manifest weight of the evidence: FOUNTAIN v. FOUNTAIN (1956) 9 Ill. App. (2) 482 ; KENT v. KENT (1942) 315 Ill. App. 284; SCOTT v. ASHCRAFT et al. (1950) 342 Ill. App. 33. But that necessarily assumes that the order and the trial court's exercise of its sound judicial discretion are based on evidence. Our review is necessarily limited to the record and if matters extraneous the record could properly be considered by the trial court there could be no effective appellate review of the exercise of the trial court's discretion.

In a proceeding for the alteration of the custody of a child in a divorce case it is error for the Court to determine the matter not only by the evidence heard in open court but by an independent investigation made or caused to be made by the Court of the mother's second husband, even if by agreement of counsel for the parties; we can determine the issues only by the evidence produced in open court; no agreement of counsel for the parties can bind the minor child, whose interest is the main question to be considered; the judicial discretion of the trial court is subject to review on the evidence heard in open court: SCOTT v. COHN (1907) 134 Ill. App. 195, affirmed (1907) 231 Ill. 556. In a similar proceeding, it is error for the trial court to consider and base its finding and order in part on a "confidential report from the Social Service Department":

DES CHATELETS vs. DES CHATELETS (1937) 292 Ill. App. 357.

In a divorce case it is error for the trial court to interrogate a minor child of the parties in chambers, out of the presence of the parties and their counsel, and not under oath as a witness, and to permit the filing in the record of an affidavit of the child purporting to state the proceedings in chambers; the affidavit is not properly a part of the trial proceedings and will be given no consideration by the Appellate Court; except for matters of judicial notice the deliberations of the trial court are limited to the record made before it; that such interrogation may have been done by agreement of counsel does not overcome its fundamentally objectionable features; what occurred in chambers, and what effect, if any, such may have had on the court's determination cannot be ascertained: ALBERT v. ALBERT (1950) 340 Ill. App. 562. In a proceeding for the alteration of the custody of a child in a divorce case it is error to admit in evidence the report of a probation officer, as the adverse party had no way of questioning the probation officer: CALLAN v. CALLAN (1955) 5 Ill. App. (2) 480. In a similar case, it has been held to be reversible error for the trial court to refer the matter to the Cook County Bureau of Public Welfare for investigation of the respective homes of the parties and to consider the confidential report of that Bureau in entering its order; the practice is clearly in violation of the declared policy of the law of Illinois; the report was not available to counsel for either party; the sources of information therein were not identifiable; the

anonymous author of the report was not sworn as a witness nor available for cross examination; the use of outside investigations and confidential reports in such cases contravenes the American ideal of due process of law; and the cause was reversed solely for that reason: WILLIAMS v. WILLIAMS (1955) 8 Ill. App. (2) 1.

Accordingly, though undoubtedly well intentioned, the Court's personally talking with the child here concerned, with the plaintiff, with Mr. and Mrs. John Kerley, and with the defendant, - matters extraneous the record, not presented in open court, not appearing in the normal course of judicial proceedings from the evidence, and not in the proofs, - upon which in part, perhaps in substantial part, the order is based, was erroneous, whether there was or was not consent to one or more features thereof by counsel for the plaintiff and defendant (and there is nothing in the record to indicate any such consent), - no such consent, even if there was any, could bind the minor child here concerned, - and the order is error.

The only matter before us being the plaintiff's appeal from the order of July 28, 1958, which order, notwithstanding its recitals, is actually only on and actually only disposes of the plaintiff's petition, and there being no cross appeal therefrom by the defendant mother, the order of July 28, 1958 is, therefore, reversed and the cause remanded, with instructions to vacate the same and to enter such order on the plaintiff's petition as shall appear on rehearing from the proofs, and law to be reasonable and proper.

Concur
Solfisburg

REVERSED and REMANDED,
WITH INSTRUCTIONS.

SOLFISBURG, P.J. AND WRIGHT, J. CONCUR.

only for the reason: WILLIAM C. HARRIS (1905) 2 J11.

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the other child have occurred, and the order is wrong.
 certainly - or not, perhaps, but it seems very much
 and (and) there is nothing in the record to indicate any such
 were known about - counsel for the plaintiff and defense
 has occurred, whether there are or not, ought to be an
 what is past, perhaps is substantial part, the order is based
 presented to him the evidence, and yet in the trial - upon
 in open court, no appearing in the usual course of judicial
 the defendant - witness and the record, the defendant
 with the plaintiff, with the law, the order, and with
 court to personally appear with the child here concerned,
 reasonably, though the order will be sustained, the

the only reason before us here, the plaintiff's appeal from the order of July 25, 1935, which order, notwithstanding the fact that, in virtually all, he was actually only disposed of the plaintiff's petition and there being no cross appeal therefrom by the defendant within the order of July 25, 1935 is, therefore, reversed and the same granted, with interest thereon to enable the wife and to cover such costs as the plaintiff herein petitioned to still appear or otherwise from the proceeds and law so to reimburse and proper.

* CONTINUOUS *

SOLEISBURG, P.J. AND WRIGHT, J. CONCUR.

Abstract

FILED

APR 26 1960

Gen. No. 11329

Agenda 1
Under
Clerk Appellate Court Second District

IN THE

APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, A.D. 1960.

2nd DIVISION

PEORIA CITY LINES, INC., a corpora-
tion, and JOHN O. GORMAN,

Plaintiffs-Appellants.

-vs-

WILLIAM R. LOWE and BOND LOAN CO.,
a corporation,

Defendants-Appellees.

Appeal from the
Circuit Court of
Peoria County,
Illinois.

25 I.A. 512

CROW, J.

This action was brought in the Circuit Court of Peoria County by the plaintiffs, Peoria City Lines, Inc., to recover for the property damage sustained to its bus, and John O. Gorman, its bus driver, to recover damages for personal injuries. The action arose by reason of a collision between a bus owned by Peoria City Lines, Inc. and operated by John O. Gorman, and a motor vehicle owned by the defendant Bond Loan Co. and operated by the defendant William R. Lowe. The defendant Bond Loan Co. filed a counterclaim against Peoria City Lines, Inc. for property damage sustained to its automobile. Motions of the defendants for directed verdict at the close of the plaintiffs' evidence and at the close of all the evidence were denied. A motion of the plaintiff-counterdefendant Peoria City Lines, Inc. for directed verdict on the counterclaim at the close of all the evidence was denied. The jury returned a verdict finding the defendants not guilty as to the complaint

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Principles

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...I sincerely hope that the Commission will be able to do so.

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10-10-68

1. *Staphylococcus aureus* 2. *Staphylococcus epidermidis* 3. *Staphylococcus saprophyticus* 4. *Staphylococcus sciuri* 5. *Staphylococcus carnosus* 6. *Staphylococcus hyal* 7. *Staphylococcus*

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10. The following table shows the number of people who attended the concert in each age group.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 08-01-2001 BY 60321 UCBAW

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and finding the counterdefendant not guilty as to the counterclaim. Final judgments were entered on the verdict. The plaintiffs' motion for new trial was denied. The plaintiffs appeal. There is no cross appeal by the counterclaimant. No questions are raised on the pleadings.

The plaintiffs' theory is that the Court erred in giving the defendants' instruction No. 15, in not granting the plaintiffs' motion for a new trial on the ground of newly discovered evidence which they urge would have totally discredited the testimony of Thomas Edwards, a material witness for the defendants, and in admitting over the plaintiffs' objection certain testimony of the plaintiffs' witness Sternfield at the time of her cross examination. There is nothing in the plaintiffs' points and authorities on the last claimed error, the matter is not argued in their brief, and it is therefore considered as waived and we have not considered it.

The collision occurred October 9, 1956, between 9:00 a.m. and 10:00 a.m., at the intersection of State and Fifth Streets in a residential section of Peoria. The plaintiff John O. Gorman was driving a thirty-two passenger bus owned by the plaintiff Peoria City Lines, Inc. in an easterly direction along Fifth Street, an east-west street. The defendant William R. Lowe was driving an automobile owned by the defendant Bend Loan Co., a corporation, in a northerly direction along State Street, a north-south street. It was a clear day and the pavement was dry. There were no traffic control signals of any kind at the intersection. State Street South of Fifth is a short block about 180 feet long, State House Square interrupting State Street the short block south of Fifth

and finally the Commission has been asked to consider the possibility of a new approach to the problem of the future of the Commission.

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No. 1, Main Road, Belgrade 10000
MONTENEGRO: AL-FAYAZ PUBLISHERS
No. 1, Main Road, Podgorica 10000
MACEDONIA: AL-FAYAZ PUBLISHERS
No. 1, Main Road, Skopje 10000
ALBANIA: AL-FAYAZ PUBLISHERS
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ROMANIA: AL-FAYAZ PUBLISHERS
No. 1, Main Road, Bucharest 10000
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SLOVAKIA: AL-FAYAZ PUBLISHERS
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CZECH REPUBLIC: AL-FAYAZ PUBLISHERS
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POLAND: AL-FAYAZ PUBLISHERS
No. 1, Main Road, Warsaw 10000
NETHERLANDS: AL-FAYAZ PUBLISHERS
No. 1, Main Road, Amsterdam 10000
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LUXEMBOURG: AL-FAYAZ PUBLISHERS
No. 1, Main Road, Luxembourg 10000
SWITZERLAND: AL-FAYAZ PUBLISHERS
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AUSTRIA: AL-FAYAZ PUBLISHERS
No. 1, Main Road, Vienna 10000
ITALY: AL-FAYAZ PUBLISHERS
No. 1, Main Road, Rome 10000
GREAT BRITAIN: AL-FAYAZ PUBLISHERS
No. 1, Main Road, London 10000
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SCOTLAND: AL-FAYAZ PUBLISHERS
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NORWAY: AL-FAY

The following summary of the results of the investigation of the case of the missing person is being submitted to you for your information. The results of the investigation are as follows:

Street. Fifth Street is about 35 to 40 feet wide, State Street is also about 35 to 40 feet wide, and both are paved with brick. Just prior to and at the time of the collision there were cars parked along the south curb of Fifth Street, west of the intersection, - the closest of which was parked some 20 feet from the intersection. There were also cars parked on the west side of State Street south of Fifth Street, - the closest of which was some 40 feet south of the south curb line of Fifth Street. The bus measured 28' 8" in length, 7' 11" in width, had an empty weight of 14,000 lbs., and a loaded weight of approximately 19,000 lbs. The car being driven by Lowe was a 1955 model 2 Door Ford. The collision occurred in the southeast quadrant of the intersection. At the time of impact the front of the bus was within a foot or two of the east curb line of State Street. After the collision the bus continued easterly down Fifth Street about 75 feet, went up over the north curb of Fifth Street, and struck a tree about 9 feet north of the north curb line. The plaintiff Gorman was jarred from his seat by the collision with the defendants' car. There were north-south skid marks in the intersection from a point near the south curb line of Fifth Street and extending into the intersection 10 or 12 feet.

The foregoing facts were essentially undisputed. The evidence is in conflict, however, as to the manner of the occurrence. The testimony as to speed, distances, point of impact, etc., was conflicting. The plaintiff Gorman testified that he was just a few feet west of State Street when he first saw the defendant; at that time the car was about 50' south of the intersection; the bus continued on into the intersection; the speed of the bus as he en-

tered the intersection was something less than 20 m.p.h.; he estimated Lowe's speed at this point as approximately 35 m.p.h.; the car struck the bus on or behind the right front wheel; no part of the car struck forward of the right front wheel; he observed no traffic approaching the intersection from any direction until the front of the bus was about to enter the intersection; he had his foot on the power brake pedal during the last 20 or 30 feet before entering the intersection and he had his foot on the brake pedal when he saw the defendant's car 50' south on State Street travelling north; he turned the bus slightly to the left; there is no evidence that immediately prior to entering the intersection or immediately prior to the collision he pressed down on the brake pedal; the bus was loaded with all seats occupied, and one or two people were standing.

The defendant William R. Lowe testified that as he approached the intersection he took his foot off the gas pedal about 40 to 50 feet from the intersection, he was travelling 20 m.p.h., and looked to his right, or east, for traffic on Fifth Street and saw that Fifth Street to the east was clear; he continued travelling about 20 m.p.h. and looked to his left, being then about 20' from Fifth Street; he first observed the white top of the bus over the parked cars travelling in an easterly direction along Fifth Street at an estimated speed of 40 m.p.h. about 40' from the intersection. On first observing the bus, he applied the brakes; his speed then was less than 20 m.p.h.; his wheels locked and his car skidded into the intersection, the left front of the car and the right front corner of the bus colliding; and his car spun around after the collision so that it came to rest headed in a southeasterly direction toward the corner of the southeast curb.

On this conflicting testimony corroborating evidence was offered by both the plaintiffs and the defendants. To corroborate the point of impact and the speed of the defendants' car, the plaintiffs introduced the testimony of three witnesses. To corroborate the defendants' version as to the speed of the bus, the defendants offered the testimony of two witnesses, including Thomas Edwards as the last witness. Edwards testified that he was in his car, stopped at Fisher Street, the next intersecting street west of State Street, as the bus went by on Fifth Street, and he turned into Fifth Street and followed the bus to the point of collision, and in his opinion the bus was going 35 to 40 m.p.h. The plaintiff Peoria City Lines, Inc. sustained damages to its bus in the amount of \$1,023.10. The plaintiff Gorman suffered severe personal injuries.

In filing their motion for new trial the plaintiffs included certain affidavits and other documents to the effect that after the jury had returned its verdict the plaintiffs learned that the defendants' witness Thomas Edwards had been convicted of a felony, had served a sentence, had once been on parole, had violated parole, and parole had been revoked, and that at the time of the accident that witness was indebted to the defendant Bond Loan Co., and that in January, 1957, three months after the collision, the Bond Loan Co. forgave the debt then owing to it. The defendants filed a motion in resistance to the motion for new trial, supported by an affidavit of an official of Bond Loan Co., to the effect that the Thomas Edwards debt had not been forgiven, he was still indebted to Bond Loan Co., and the defendant Bond Loan Co. had made no promise or agreement to forgive any part of the obligation owed it by Thomas Edwards.

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The plaintiffs complain of the defendants' given instruction No. 15. That instruction was as follows:

"The Court instructs the jury that if you find from the evidence, if any, that the motor bus driven by John O. Gorman and the car driven by William R. Lowe, which were involved in the collision in this case, were approaching the intersection of State and Fifth Streets at approximately the same time, and if you further find that the car being driven by William R. Lowe was being driven at a reasonable rate of speed under the circumstances, and that the car driven by William R. Lowe was in the intersection or so close to the intersection that the bus being driven by John O. Gorman could not enter safely and cross said intersection without colliding with the car being driven by William R. Lowe, then the law is that the car driven by William R. Lowe had the right-of-way at the intersection of State and Fifth Streets."

The statute applicable was Sec. 68 of the Uniform Act Regulating Traffic on Highways, CH. 95 1/2 ILL. REV. STATS., 1955, par. 165, and, as amended in 1953, it read as follows, so far as material:

- "(a) The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway.
- "(b) When two vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right."

The defendants assert their given instruction No. 15 was proper, but that the plaintiffs' given instruction No. 4 states, in substance, the same thing as does the defendants' instruction No. 15, and that the plaintiffs, under the circumstances, should not be permitted to complain about the instruction tendered by the defendants when the plaintiffs tendered and had given an instruction on the same matter and subject to the same or like criticism, if any.

The plaintiffs' given instruction No. 4 was as follows:

"The Court instructs the jury that the right of way given to vehicles approaching an intersection is not an absolute right. The law that gives the right of way to a vehicle approaching an intersection from the right of another vehicle does not contemplate that this right of way may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within recognized limits of speed, the car to the left will reach the line of crossing before the car to the right will reach the intersection."

Undoubtedly, a determination by the jury of who under the circumstances had the right of way here was an essential matter for the jury's consideration. Both the plaintiffs and the defendants were entitled to submit a proper proposed right of way instruction based on the law then applicable under their respective theories of the case in the light of all the facts and circumstances in evidence.

The only cases cited, however, by either the plaintiffs or defendants on these instructions are: BESSETTE et al. v. LOEVI (1956) 11 Ill. App. (2) 482 and RUBINSTEIN et al. v. FRED A. COLEMAN CO. et al. (1959) 22 Ill. App. (2) 116. We do not believe either case is in point here. Neither one of them involved an instruction the same as or similar to either of the instructions here concerned. The BESSETTE case accident occurred at a time prior to the 1953 amendment of the right of way statute and the instruction particularly involved was based on the statute in its then different form, - it is helpful only generally in its observation that the instruction, though in the language of the then statute, was incomplete because it did not contain qualifications as to speed and distance. The RUBINSTEIN case accident did occur at a time when the 1953 amendment of the statute was in effect, but

When these conditions are met, the following steps should be taken:

1. The first step is to identify the problem and its cause.
2. The second step is to develop a plan of action.
3. The third step is to implement the plan.
4. The fourth step is to evaluate the results.
5. The fifth step is to make adjustments as needed.

These steps are not always linear, and they may overlap. The key is to be systematic and to keep track of progress.

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the instructions particularly involved were erroneously based on the statute in its earlier form prior to the 1953 amendment, - and it is helpful only as to the comment that the provisions of a prior statute respecting the right of way at the intersection involved were not applicable or material on the trial of that cause. We have been referred to no case approving the giving of either defendants' instruction 15 or plaintiffs' instruction 4 under circumstances similar to those involved here and under the 1953 amendment to the right of way statute.

Both of those instructions express about the same idea, though inversely and in different language. Both purport to be right of way instructions, but neither of them refers in any way to the basic applicable statute on the subject of right of way as amended in 1953. They do not set forth the statute or summarize its terms. This is not to say they, or either, would have necessarily been proper had they set forth the statute or summarized its terms, - they may be otherwise objectionable or incomplete, - but they are objectionable for that reason. They both are confusing and possibly misleading to the jury. The defendants' instruction 15 has some language in it at variance with the statute or not contained in the statute. The plaintiffs' instruction 4 gives the appearance of relating more to the statute as it existed prior to the 1953 amendment than as it is as so amended. We do not approve of either instruction.

Under the circumstances, the plaintiffs may not complain about the defendants' instruction on right of way when the plaintiffs have tendered a similarly erroneous instruction on the same subject which has also been given; a party has no right to complain of error in an instruction when the same or like error ap-

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There are also some other things that are not mentioned in the report, but which are of great importance. These are the things that are mentioned in the report, but which are not mentioned in the report.

pears in an instruction given at his own request: FLEMING et al. v. E. J. and E. RY. CO. (1916) 275 Ill. 486; MCINTURFF et al. v. INSURANCE CO. of N. A. (1910) 248 Ill. 92.

The other error urged involves the defendants' witness Edwards and the plaintiffs' alleged newly discovered evidence as to him. It appears to us that the claimed newly discovered evidence as to the witness Edwards, even if it were all true (and it is in part denied by the defendants) was not material to the issues of the case in any event, but related only to the possible discrediting or impeachment of that witness and the weight to be attached to his testimony. The claimed newly discovered evidence does not controvert the substantive testimony of that witness. It does not appear to be of such a conclusive character that it would probably change the result if a new trial had been granted. In BENIS v. HORNER et al. (1897) 165 Ill. 347, the Court said: "The rule is well settled that when the new evidence tends merely to discredit or impeach another witness it will not satisfy the requirements of the law for a new trial." Motions for new trial on this particular ground are not looked upon with favor and are to be subjected to close scrutiny. The disposition of motions of that nature based on that grounds is largely discretionary with the trial court and the exercise of its discretion will not be disturbed unless in a case of manifest abuse thereof. See: STOCKER v. SCHERER et al. (1953) 1 Ill. (2) 405; HENDERSON et al. v. SHIVES (1956) 10 Ill. App. (2) 475; POWERS et al. v. BROWNING (1954) 2 Ill. App. (2) 479; TAYLOR v. A. T. and SANTA FE RY. CO. (1937) 292 Ill. App. 457. We have read BRISKE v. VILLAGE OF BURNHAM et al. (1941) 308 Ill. App. 531, suggested by the plain-

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tiffs, but do not believe that the facts are at all similar to those of the instant case, and the determination of the BRISKE case was primarily on entirely different grounds. There was no error in denying the motion for new trial so far as the grounds of newly discovered evidence is concerned.

Under the state of the record and the claimed errors urged, we believe the judgment should be, and it is affirmed.

A F F I R M E D.

Concur

P. J. Solfisburg / P. J.

Solfisburg, P. J. and Wright, J. Concur.

Gen. No. 11313

Agenda 16

IN THE
 AFFILIATE COURT OF ILLINOIS
 SECOND DISTRICT, SECOND DIVISION
 OCTOBER TERM, 1959

Abstract

LYMAN R. LUNDY and
 JOHN L. BUTLER, d/b/a
 LUNDY, BUTLER & LUNDY,
 Plaintiffs-appellees,

-vs-

HAZEL E. MESSER, ADAM G. MESSER,
 GEORGE E. JOHNSON, MARIE JOHN-
 SON, JOSEPHINE MARTIN, RUTH I.
 ALDER, C. RUSSELL MESSER, KENN-
 ETH E. MESSER, and NORMAN D.
 L. MESSER,

Defendants.

HAZEL E. MESSER,

Appellant.

Appeal from
 Circuit Court of
 Winnebago County.

25 I.A.^{2d} 513

CROW, J.

This is a suit to foreclose an alleged mortgage on real estate in Winnebago County. A decree of foreclosure was entered, finding the amount due the plaintiffs, fixing the amount of attorneys fees for the plaintiffs' attorneys, and directing the premises to be sold to satisfy the debt, unless paid within a time certain. Hazel E. Messer, one of the defendants, filed a motion to vacate the decree, which was denied, and she is the only defendant who has perfected an appeal. The plaintiffs-appellees are Lyman R. Lundy and John L. Butler, d/b/a Lundy, Butler & Lundy, attorneys, of Eldora, Iowa.

The defendant-appellant, Hazel E. Messer, urges that the trial court committed error in the following particulars: (1) the court was without jurisdiction of the person of a necessary

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party plaintiff, Edward H. Lundy, and of the subject matter of the suit; (2) the complaint does not allege a cause of action; (3) the defendant-appellant had a right to trial by jury and the court arbitrarily abused its discretion in refusing to direct the issues to be tried by a jury; (4) the instrument dated October 9, 1951 (hereinafter referred to) was not intended to create a mortgage; (5) the free and voluntary assent of the parties is essential to the validity of a mortgage; (6) the certificate of acknowledgment thereon was not in proper form; (7) the court erred in the admission of evidence; (8) there is no evidence showing that the attorneys fees allowed the plaintiffs' attorneys in this foreclosure suit were reasonable; (9) the evidence is insufficient to support the decree; (10) the decree is void, and (11) the defendant-appellant did not have a fair trial.

The complaint alleges, substantially the following: that the plaintiffs Lyman R. Lundy and John L. Butler, attorneys, of Eldora, Iowa, are copartners under the name of Lundy, Butler and Lundy. On October 15, 1951, Hazel R. Messer was indebted to the plaintiffs in the principal sum of \$4600.00, and to evidence and secure said indebtedness she made and delivered her promissory note payable to Lundy, Butler & Lundy, in that amount, bearing interest at the rate of 7% per annum from maturity, the principal to be paid on the 15th day of April, 1952, a copy of the note being attached to the complaint. She and her husband executed and delivered to the plaintiffs their instrument dated October 9, 1951 to secure that \$4600.00 note and whatever attorneys

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fees might become due for past or future litigation and expenses the plaintiffs-appellees might incur or pay, pledging the real estate concerned, which instrument was acknowledged, and recorded, and a copy of the instrument being attached to the complaint. On May 27, 1955 she executed another instrument directing the plaintiffs-appellees to take title to some other real estate in Winnebago County, Illinois as additional security for all her indebtedness, on the same terms as the previously referred to mortgage, and a deed was so made to them pursuant thereto, and copies of that further instrument and that deed were attached to the complaint. She has made default under the \$4600.00 note, a certain sum is due the plaintiffs thereunder, and the note, mortgage and additional security instruments are the property of the plaintiffs. Commencing about October 17, 1951, to about November 30, 1956, the defendant, Hazel R. Messer, orally employed the plaintiffs, Lundy, Butler & Lundy, attorneys, to represent her in gaining the control and rental of her Iowa farm, in connection with her marital difficulties, in connection with the refinancing of an indebtedness on her Rockford, Illinois property, and in connection with the financing of her Waterloo property. Pursuant to such employment, the plaintiffs proceeded to represent her interests in all of those matters; the plaintiffs prepared and instituted a suit for her separate maintenance in a Court in Iowa, procured the appointment of a receiver for the management of properties jointly held by her and her husband, conducted hearings upon temporary support; represented her in connection with her certain financial difficulties with her Rockford, Illinois property, and represented her in connection with her financing of her Waterloo

apartment house. The fair and reasonable value of those services was \$900.00 on which \$750.00 had been paid, leaving a \$150.00 balance, and the plaintiffs are the owners of the claim. On November 28, 1951 she was indebted to the plaintiffs \$160.00 for certain expenses and in evidence thereof she made another note to Edward H. Lundy, John L. Butler, and Lyman E. Lundy in that amount on certain terms, a certain sum is due on that note, and it is the property of the plaintiffs. The plaintiffs in connection with all those matters made advancements to the defendant-appellant totalling \$2537.17, which are due the plaintiffs. Commencing about May 29, 1953, the defendant-appellant employed the plaintiffs to represent her in connection with her claim for damages to, and destruction of, her Waterloo apartment house and for personal injuries; the plaintiffs investigated the claims, negotiated a proposed settlement thereof, and upon her failure to approve the proposed settlement they prepared the case for trial and tried the case to a jury in a Court in Iowa, the jury's verdict being against her claims; the fair and reasonable value of the plaintiffs' services for that was not less than \$7,000.00, and the plaintiffs are still the owners of the claim. The complaint alleged that by virtue of the terms of the mortgage, notes, defaults, and elections of the plaintiffs there was due the plaintiffs \$15,669.97. There were additional allegations concerning advancements by the plaintiffs of certain general real estate taxes, and insurance premiums, that the defendant-appellant has defaulted in the payment of the \$4600.00 note of October 15, 1951 and in the payment of all additional sums due the plaintiffs under the terms of the alleged mortgage of October 9, 1951, and that the plaintiffs have been

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compelled to employ counsel to prosecute this foreclosure suit. The complaint, briefly, prays for an accounting of the amounts due the plaintiffs, a determination as to the parties personally liable thereon, the amount due be decreed a lien, in default of payment the premises be sold to pay the same, a certificate of sale etc. may issue, a deficiency decree be entered for any deficiency, a receiver be appointed, and for general relief.

The copy of the \$4600.00 note of October 15, 1951, attached to the complaint, reads, so far as material, " * * * * On the 15th day of April, 1952, we promise to pay to Lundy, Butler, and Lundy or order * * * * ". The copy of the instrument of October 9, 1951 sought to be foreclosed, attached to the complaint, reads, so far as material, -

"Whereas, Hazel R. Messer of the County of Black Hawk, State of Iowa, has an action now pending in the Courts of the State of Iowa; and

"Whereas, She expects to have additional litigation finally pending; and

"Whereas, Edward H. Lundy, John L. Butler and Lyman R. Lundy, d/b/a Lundy, Butler and Lundy, have been her attorneys in such litigation and are expected to continue in the conduct of the litigation of the said Hazel R. Messer in the future; and

"Whereas, A separate contract has been made in reference to the payment of such fees;

"Now, Therefore, To secure the payment of whatever attorney fees may become due or payable for past litigation or for future litigation and for whatever expenses as they may incur or may pay said Hazel R. Messer does hereby pledge the following described real property for the payment of any and all sums which may at any time be due from her to the said Lundy, Butler and Lundy, to-wit:
* * * * *

"hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of Illinois and all right to retain possess-

ion of said premises after any default in payment or breach of any of the covenants or agreements herein contained.

"And It Is Expressly Provided and Agreed, That if default be made in the payment of the said fees and expenses or of any part thereof when the same have become due and in the manner above specified for the payment thereof, or in case of waste or non-payment of taxes or assessments on said premises, or of a breach of any of the covenants or agreements herein contained, then and in such case the whole of said principal sum and interest secured thereby in this mortgage mentioned shall thereupon, at the option of the said mortgagee, their heirs, executors, administrators, attorneys or assigns become immediately due and payable; and this mortgage may be immediately foreclosed to pay the same by said mortgagee, their heirs, executors, administrators, attorneys or assigns. And it shall be lawful for the said mortgagee, their heirs, executors, administrators, attorneys or assigns to enter into and upon the premises hereby granted or any part thereof, and to receive and collect all rents, issues and profits thereof.

"Upon the Filing of Any Bill to foreclose this mortgage in any Court having jurisdiction thereof, such Court may appoint any proper person receiver, with power to collect the rents, issues and profits arising out of said premises during the pendency of such foreclosure suit, and until the time to redeem the same from any sale that may be made under any decree foreclosing this mortgage shall expire; and such rents, issues and profits when collected may be applied toward the payment of the indebtedness and costs herein mentioned and described. And upon the foreclosure and sale of said premises there shall be first paid out of the proceeds of such sale all expenses of advertisement, selling and conveying said premises and reasonable attorneys' or solicitors' fees to be included in the decree and all moneys advanced for taxes, assessments and other liens; then there shall be paid the principal of said indebtedness whether due and payable by the terms thereof or not, and the interest thereon.

"And Adam Messer, husband of the said Hazel R. Messer hereby relinquishes all his right in and to the foregoing described real property as to the payment of any such sums and shall not become personally liable for any sums secured by this mortgage."

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1. The above information was obtained from the files of the FBI, New York Office, and is being furnished to you for your information.

It appears to have been acknowledged before Dorothy Palmer, Deputy Clerk of the District Court of Grundy County, Iowa. The copy of the instrument of May 27, 1955, attached to the complaint, directed the plaintiffs-appellees to pay certain items from the moneys they were advancing the defendant-appellant, and directed them to take title to certain other real estate "as additional security for all indebtedness owed by me unto you, such security to be held under the same terms and provisions as the mortgage which you now have." A copy of a deed of June 2, 1955 to the plaintiffs-appellees for such other real estate was attached to the complaint. A copy of the defendant-appellant's note of November 28, 1951 for \$160.00, payable to Edward H. Lundy, John L. Butler, and Lyman R. Lundy or order was attached to the complaint. All of the foregoing instruments are in evidence. A copy of the plaintiffs-appellees' statement of account to the defendant-appellant of August 24, 1956 for \$2537.13 net advancements was attached to the complaint. That statement of account is not in evidence but the plaintiffs' ledger cards indicating the advancements are in evidence.

The defendant-appellant moved to dismiss the complaint on the grounds, among others, that Edward H. Lundy is a necessary party plaintiff, and that it does not allege a cause of action, which motion was denied. She filed a demand for jury. Her answer denied all the allegations except the execution and delivery of the \$4600.00 note of October 15, 1951, the instrument of October 9, 1951, the instrument of May 27, 1955, and the \$160.00 note of November 28, 1951, and alleged that all of the instruments concerned were made without any good and valuable consideration, and alleged that she did not authorize the advancements in the

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plaintiffs-appellees' statement of account of August 24, 1956.

A receiver was appointed. She moved that certain issues be tried by a jury, which was denied and the demand for jury stricken.

The cause was heard before the Court, without a reference to a Master in Chancery. The witnesses for the plaintiffs-appellees were the defendant-appellant under Section 60 of the Civil Practice Act, John L. Butler, one of the plaintiffs, Wirt Hoxie, a Waterloo attorney associated with the plaintiffs-appellees in representing the defendant-appellant in her matters there, Edward H. Jones, a Des Moines attorney and Secretary of the Iowa State Bar Association, Craig R. Kennedy, a Waterloo attorney and member of the Board of Governors of the Iowa State Bar Association, and Donald C. Wilson, presently a member of the plaintiffs' firm. The defendant-appellant was the only witness for the defendant-appellant.

In addition to the exhibits in evidence heretofore referred to, these exhibits also were in evidence: a settlement stipulation between the defendant-appellant and her husband, a deed from her husband to her, an Agreement dated August 28, 1951 signed by Hazel R. Messer and LUNDY, BUTLER and LUNDY, by John L. Butler, to the effect that they are to represent her in pending and possible future litigation, and she shall pay the attorneys the fair and reasonable value of their services, together with their reasonable expenses, as hereinbefore and hereinafter may be incurred, a petition in equity by her against her husband in an Iowa Court, a series of 151 time slips of the attorneys beginning April 29, 1950, another series of 225 time slips beginning March 13, 1952, another series of 574 time slips beginning May 29, 1953, certain

ledger cards of LUNDY, BUTLER & LUNDY showing the Hazel R. Messer account of receipts and expenditures, certain ledger sheets of Wirt Hoxie showing the Hazel R. Messer account, and a receipt of October 15, 1951 of the plaintiffs-appellees acknowledging receipt of the heretofore referred to \$4600.00 note in full settlement of services and expenses in connection with the defendant-appellant's matters with her husband.

In addition to the admissions in the pleadings, and the exhibits in evidence, it appears, so far as material, that Edward H. Lundy was a member of the firm of Lundy, Butler & Lundy from 1938 until April, 1953; from then until April, 1958, Lyman R. Lundy and John L. Butler, were the only partners; they purchased the interest of Edward H. Lundy, who retired, - there was a final settlement with him, - they took over all the assets, the accounts receivable, - and Mr. Butler said he and Lyman R. Lundy own the assets. On April 29, 1950 the defendant-appellant Hazel R. Messer came to their office and first talked with Edward H. Lundy and John L. Butler. They represented her in a divorce suit and a quiet title suit instituted by her husband, which the husband later dismissed before trial. They also represented her in a suit she instituted to quiet title, which was terminated by stipulation about a year later. She said Mr. Butler told her the instrument of October 9, 1951, heretofore referred to, was to secure his wages, - whatever fees he might charge; she said she did not read it, but signed it, having no idea it was a mortgage, and did not sign it before Dorothy Palmer, Deputy Clerk, but she said it was signed in or about the Court room. Mr. Butler said the Clerk was present when the instrument was signed, and

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Dorothy Palmer, a Deputy Clerk, took the acknowledgment, and the defendant-appellant acknowledged it in the chambers adjoining the Court room. Each of the members of Lundy, Butler, & Lundy kept daily time slips for each item, and according to those Mr. Butler devoted about 12,000 minutes to the defendant-appellant's matters from April 29, 1950 to October 15, 1951; the time slips are filed in files under the name of each client; whoever performed the services dictated the slips; they are kept in the usual and daily course of business. Edward H. Lundy did not make a specific written endorsement or assignment of his interest in the \$4600.00 note of October 15, 1951 or the instrument of October 9, 1951 to Lyman R. Lundy and John L. Butler, d/b/a Lundy, Butler & Lundy, either on the note or instrument, or by separate document. Mr. Butler said the \$4600.00 note, by agreement, covered fees and expenses from the time she originally came to them to that date. Shortly after October 15, 1951 Lundy, Butler & Lundy again represented Hazel R. Messer in a separate maintenance suit by her which is still pending, as to the control of a farm, as to refinancing of her Rockford property, and as to a mortgage on a Waterloo property. Time slips were kept for that work, the charge was \$900.00, which Mr. Butler said was less than reasonable, and \$750.00 was paid on account. Beginning in May, 1953, Lundy, Butler & Lundy represented her again concerning damages to her Waterloo property, suit was instituted, settlement negotiations failed, trial was had for 14 days, Wirt Hoxie of Waterloo was associated in representing her, and the verdict was adverse to her. On that the time slips indicate Lundy, Butler & Lundy had 975 hours in addition to the 14 days trial, and they charged her \$5000.00, plus \$2000.00 for Mr. Hoxie, which Mr. Hoxie said was less than the fair and usual charge for such in Waterloo.

b

Mr. Jones and Mr. Kennedy testified to the minimum fee schedule charges in Waterloo, - \$100.00 per day in Court, and \$15 to \$20 per hour otherwise. Some payments on fees, expenses, and advancements were made by her, and applied on various of the accounts, and from the account ledger cards as to her account, which were posted from a daily journal, there were \$2537.13 net advancements. She said she did not authorize certain expenses, though she was aware the plaintiffs were attending to her matters. Mr. Hoxie identified the ledger sheets of her account in his office, kept under his supervision in the usual course of business.

The decree, generally, finds the material allegations of the complaint to be true, a default under the terms of the mortgage instrument of October 9, 1951, and the equity of the cause to be with the plaintiffs; that the plaintiffs have succeeded to the interest of Edward H. Lundy in the partnership of Lundy, Butler & Lundy and are the owners of the \$4600.00 note of October 15, 1951 and mortgage of October 9, 1951, by assignment from Edward H. Lundy, the plaintiffs are obligated for the reasonable fees of their counsel herein of \$1256.79, which is additional indebtedness due under the mortgage, that the following sums are now due and owing to the plaintiffs Lyman R. Lundy and John L. Butler, d/b/a Lundy, Butler & Lundy:

- | | |
|---|------------|
| a. Promissory note dated October 15, 1951 | |
| Principal | \$ 3117.57 |
| Interest at 7% from April 15, 1952 | |
| to December 26, 1958 | 1710.19 |
| b. Attorneys' fees of \$900.00 incurred | |
| by defendant Hazel R. Messer from | |
| October 17, 1951 to November 30, | |
| 1957 less credit of \$750.00 | 150.00 |

c.	Promissory note dated Nov. 28, 1951	
	Principal	\$ 160.00
	Interest to Dec. 26, 1958	97.58
d.	Advancements	2799.79
e.	Attorneys' fees incurred by Hazel R. Messer from May 29, 1953 to date in connection with damage to apartment house and for personal injuries	7000.00
f.	General taxes, penalties and interest on Lots 52, 53 and 67 School Street Subdivision	548.06
g.	Attorneys' fees (prosecution of this suit)	1256.79
h.	Insurance	<u>30.00</u>
	Total Amount Due	\$16,869.98

and court costs, for which sum the mortgage in question (the instrument of October 9, 1951) is a valid lien upon the real estate concerned, and for which the defendant-appellant is personally liable, and the decree orders the sale thereof unless the indebtedness be paid within a certain time.

The defendant-appellant first urges that the Court was without jurisdiction of the person of a necessary party plaintiff, Edward H. Lundy, and of the subject matter of the suit. The rule in chancery pleading and practice is that all persons who are legally or equitably interested in the subject matter and result of the suit must be made parties, - the interest referred to, however, must be a present, substantial interest : OGLESBY et al. v. SPRINGFIELD MARINE BANK et al. (1944) 385 Ill. 414. If the legal title to a note secured by a mortgage passes to a transferee the transferee thereby becomes the equitable assignee of the mortgage, - the mortgage being a mere incident to the debt, whatever is sufficient

to transfer the title to the debt will also transfer the interest of the mortgage: FOUNTAIN et al. BOOKSTAVEN et al. (1892) 141 Ill. 461. It may be a matter of no consequence whether a note secured by a mortgage be specifically endorsed or not, - if delivered to the mortgagee that is an equitable assignment of the note and would enable the mortgagee to commence and prosecute a suit to foreclose the mortgage securing the same in his own name: SPENCER et al. v. JOHNSON et al. (1883) 107 Ill. 385. A transferee of a note secured by a mortgage, even though the mortgage may not be formally assigned, has an equitable right to enforce the security and even to use the original mortgagee's name for that purpose, if necessary: KIMMEL v. WEIL (1900) 95 Ill. App. 15. The transfer of a note or obligation evidencing a debt secured by a mortgage operates as an assignment of the mortgage securing the debt and it is not entirely necessary that the mortgage itself be specifically transferred in writing or a specific written assignment thereof be made: TAYLOR v. CHAMPAIGN COUNTY ABSTRACT CO et al. (1937) 288 Ill. App. 442. The assignment of a mortgage note carries with it an equitable assignment of the instrument by which it is secured, - if the title to the note passes, then, as an incident thereto, there passes an equitable assignment of the security instrument: MILLER v. FREDERICKS' BREWING CO. (1950) 405 Ill. 591. Where the note or notes or other obligation secured by a mortgage and the mortgage or security instrument itself are in the possession of the plaintiff and he produces them in the suit to foreclose that is prima facie evidence of ownership thereof in the plaintiff: ALBERS v. DRESSEL et al. (1940) 307 Ill. App. 470;

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cf. FOUNTAIN et al. BOOKSTAVEN et al. (1892) 141 Ill. 461. Under the circumstances, from the evidence and the reasonable inferences and inferences therefrom, it does not appear that Edward H. Lundy is legally or equitable interested in the subject matter and result of the suit, - he has no present, substantial interest. The plaintiffs-appellees purchased his interest, had a final settlement with him, took over and own all the assets of Lundy, Butler and Lundy, including accounts receivable, and are now the only partners. It was not necessary that Edward H. Lundy make a specific written endorsement or assignment of his interest in the \$4600.00 note or the instrument of October 9, 1951 or the other obligations secured by the alleged mortgage if he in fact transferred his interest therein to the plaintiffs-appellees, as he evidently did, - there is no evidence otherwise. All of the various instruments involved were in the possession of the plaintiffs-appellees and were produced by them in this suit, and that itself is prima facie evidence of ownership thereof in them, - the defendant-appellant offered no evidence to the contrary. We do not believe Edward H. Lundy was a necessary party plaintiff: TAYLOR v. CHAMPAIGN COUNTY ABSTRACT CO. et al. (1937) 288 Ill. App. 442. The only Illinois case the defendant-appellant cites on this, MYERS v. WRIGHT (1864) 33 Ill. 284, is not contrary to our views or the principles of the other cases to which we have referred. The defendant-appellant makes no argument and cites no authority to the effect the Court has no jurisdiction of the subject matter of the suit.

She next urges the complaint does not allege a cause of action, and the argument on that is that the complaint must allege

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the plaintiffs are the owners and holders of the debt and mortgage; there is no allegation of the transfer of the note or the assignment of the purported mortgage to the plaintiffs; and the question of the amount of the plaintiffs-appellees' attorneys fees must be settled in a separate action at law, which remedy is adequate and complete, and it is improper to determine the amount thereof in this suit in equity to foreclose a mortgage given to secure the same. There are ample allegations in the complaint, particularly in paragraphs 2, 3, 5, 6, 8, 9, 10, 11, 12, 13, 19, 20, 21, 22, and 23, to the effect, in substance, that the plaintiffs-appellees are the owners and holders of the debt and mortgage. There need be no allegation of a specific written endorsement or assignment by Edward H. Lundy of his interest in the note or purported mortgage to the plaintiffs-appellees, if he in fact transferred such interest. To the substantive law on that we've already alluded. The complaint pleads the ultimate facts of the plaintiffs' ownership and holding of the debt and mortgage, and that is all it need do in this respect. It was not necessary, and would have probably been improper pleading, to go on and plead in detail the evidentiary facts as to the history of the partnership proceedings, - the allegations amply informed the defendant-appellant of the claims and were a sufficient basis for the decree: Cf. GREENLEAF et al. v. FRIMBERG et al. (1918) 210 Ill. App. 271. When a court of equity has jurisdiction of a cause for one purpose, such as to foreclose a mortgage, it will retain such for all related purposes, - it will proceed to determine all matters at issue and do complete justice, - and in doing so it may establish what might otherwise be purely legal rights which might otherwise be beyond its power: MARTIN v.

STRUBEL (1937) 367 Ill. 21. We do not perceive that LONG v. COFFMAN (1924) 231 Ill. App. 265, the only case the defendant-appellant cites on this, has any bearing.

The defendant-appellant next urges that she had a right to trial by jury, and the Court arbitrarily abused its discretion in refusing to direct the issues to be tried by a jury. The provision of the CONSTITUTION OF 1870, ARTICLE II, SEC. 5, so far as material, is that "The right of trial by jury as heretofore enjoyed, shall remain inviolate; * * * ". There was no right of trial by jury heretofore enjoyed before the Constitution of 1870 in a mortgage foreclosure case in chancery such as this. In the absence of express statutory or constitutional provisions, a jury is no part of the chancery system; the guaranty of the right to a jury trial does not extend to cases of equity jurisdiction, such as a suit to foreclose a mortgage; the provision of the Constitution does not extend to cases in equity but is confined to cases at law: MARTIN v. STRUBEL et al. (1937) 367 Ill. 21. Under CH. 110, ILL. REV. ST. TS., 1957, par. 63 " * * the Court may in its discretion direct an issue or issues to be tried by a jury, whenever it is judged necessary in any case in equity * * * ". In all other cases in equity, the mode of trial shall be the same as has been heretofore practiced in Courts of chancery. * * * ". There was no abuse of discretion here in the Court's not directing an issue or issues to be tried by a jury, - it was not required to do so, though it might have done so in its discretion. The mode of trial, under the circumstances, was, therefore, required to be the same as heretofore practiced in Courts of chancery, - which does not include a trial by jury. To the extent there may have been

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questions of fact as to the employment of the plaintiffs to represent the defendant, the legal services rendered, the fair and reasonable value thereof, and the expenses, such had to be tried in the same way any other fact questions have to be tried in a mortgage foreclosure case in chancery, - without a jury, - simply as a part of determining whether the plaintiffs are entitled to any relief, and if so, what, and to what extent. The defendant-appellant cites no cases on this.

The defendant-appellant's next point is that the instrument of October 9, 1951 was not intended to create a mortgage, the argument being that it attempts to pledge certain real estate as security; it does not use the language sell, convey, and mortgage; if it was an equitable mortgage it cannot be made to secure future debts; and the intention to create an equitable mortgage must be clearly established. The statute in effect at that time, CH. 30, ILL. REV. ST. TS., 1951, pars. 10 and 37a provided (par. 10) for mortgages of land as to form and effect, that mortgages may be in the form, substantially, set forth in the statute, and (par. 37a) the time when the mortgage lien attaches, paragraph 37a reading, so far as material:

"37a. TIME WHEN MORTGAGE LIEN ATTACHES.) Sec. 39. Every mortgage or trust deed in the nature of a mortgage shall, as to lands not registered under the provisions of an act entitled "An Act Concerning Land Titles," approved and in force May 1, 1897, as subsequently amended, from the time it is filed of record, * * * * * be a lien upon the real estate thereby conveyed situated in the county in which such instrument is recorded * * * for all monies advanced or applied or which may at any time thereafter be advanced or applied thereunder on account of the principal indebtedness which such mortgage or trust deed shall purport to secure and including such other monies which may at any time be advanced or applied as are authorized by the provisions of such mortgage or trust deed or as are authorized by law; provided, that as to subsequent purchasers and judgment creditors, every

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THE UNITED STATES OF AMERICA
DO hereby certify that the within and foregoing is a true and correct copy of the original as the same appears on the records of the Department of the Interior.

such mortgage or trust deed shall, as to the monies advanced or applied thereunder on account of the principal indebtedness evidenced by the notes, bonds or other instruments therein described and thereby secured, be a lien only from the time such monies are advanced or applied, unless such monies are advanced or applied within eighteen months after the date of such recording * * * * * or unless the mortgagee is by contract obligated to make such advances or applications, * *

A debt or mortgage obligation of some character is an essential element in a transaction to create the relation of mortgagor and mortgagee: FISCHER v. TUOHY (1900) 186 Ill. 143. But a mortgage may properly be made to secure future debts, advances, or responsibilities: COLLINS et al. v. CARLILE et al. (1851) 13 Ill. 254. When given to secure future advances it can only take effect as a lien from the time some debt or liability secured by it is created, - the lien begins only when money is advanced or the contemplated debt comes into existence in the course of dealing between the parties, - the lien is measured by the extent of the advances and the amount of the debt: FREUTEL v. SCHMITZ (1921) 299 Ill. 320. It is not essential that the instrument of conveyance should follow any exact or prescribed form of words, provided the intention to convey is expressed; to make a conveyance valid it is sufficient, in general, that there be parties able to contract and be contracted with, a proper subject matter sufficiently described, a valid consideration, apt words of conveyance, and an instrument duly executed and delivered; courts will so construe a conveyance as to give effect to the intention of the parties rather than defeat such an intention by a strict technical construction of the form of conveyance adopted, - courts are liberal in construing instruments of conveyance so as to give them effect: CROSS v. WEARE COMMISSION CO. et al. (1894) 153 Ill. 499, where an instrument

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was upheld as a proper real estate mortgage on a chattel real even though (a) made on a printed blank chattel mortgage form, (b) the property was not definitely described as real estate but was referred to as goods and chattels, and (c) it was acknowledged as a chattel mortgage. In the instrument of October 9, 1951 Hazel R. Messer is not specifically called "mortgagor", though it is obvious she is such in fact; Edward H. Lundy, John L. Butler, and Lyman H. Lundy, d/b/a Lundy, Butler & Lundy are not specifically called "mortgagees", though again it is obvious they are such in fact; it says she "does hereby pledge the following described real property", instead of "mortgages" such, but that seems unimportant when it appears clear the parties were referring only to real estate, not personal property; it does not say "and warrants" but that is not necessary if no questions of full covenants of seizin etc. are involved; it specifically says it is "to secure the payment of" etc., reciting the nature of the indebtedness; it specifically refers to "the following described real property" by legal description; it is dated, and signed by her and her husband; it purports specifically to release and waive all rights under and by virtue of the homestead exemption laws of Illinois; and it purports to be acknowledged. It was to secure, in part, monies then or theretofore advanced or applied, and, in part, monies thereafter to be advanced or applied. It waives the right to possession after default, provides that in such event the whole sum may become due, it may be foreclosed, the creditors may enter into possession, a receiver may be appointed, etc., - provisions normally expected to be found in a mortgage. The parties specifically refer in the instrument itself to "this mortgage", "said mortgagee", "this mortgage may be immediately foreclosed", etc. And in the later instrument of May 27, 1955 referring

to some other real estate, the parties described it "as additional security for all indebtedness owed by me unto you, such security to be held under the same terms and provisions as the mortgage which you now have." Under the circumstances we believe the instrument of October 9, 1951 was in the form, substantially, indicated in the statute, that it was intended to create a mortgage, and if otherwise properly executed it should be deemed and held a good and sufficient mortgage in fee to secure the payment of the moneys therein specified.

As to the defendant-appellant's next point - that the free and voluntary assent of the parties is essential to the validity of a mortgage, she points out nothing in the pleadings making any issue in that respect, and she suggests nothing in the evidence tending to show there was no free and voluntary assent of the parties here.

The defendant-appellant next urges the certificate of acknowledgment on the instrument of October 9, 1951 was not in proper form. The acknowledgment, so far as material, as to Hazel R. Messer, reads:

"State of Iowa,
Grundy County - ss.

Be It Remembered, That on the 9th day of October, A. D., 1951, before the undersigned Dorothy Palmer, Deputy Clerk in and for said county, personally appeared Hazel R. Messer to me personally known to be the identical person whose name is affixed to the foregoing instrument as grantor and acknowledged the execution of the same to be her voluntary act and deed.

Dorothy Palmer
Deputy Clerk in and for
Grundy County, Iowa

(District Court Seal)"

Under CH. 30, ILL. REV. STAT., 1951, par. 19 mortgages may be acknowledged without this State and within the United States before, among others, a "deputy clerk * * of the * * district * * * court of any of the states * * *"; if taken before a deputy clerk it

to some other well known, the latter described in the additional
evidence for all investigations (see p. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 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shall be certified "under the seal of his court"; and "an acknowledgment or proof of execution of any instrument aforesaid may be made in conformity with the laws of the State * * * where it is made * * * ". The officer taking this acknowledgment was properly authorized to do so under that statute, the certificate is under the seal of that Iowa Court, and there is nothing to indicate it is not in conformity with the laws of the State of Iowa where it was done. The certificate of acknowledgment is also substantially in the form indicated by our statute, CH. 30, ILL. REV. STATS., 1951, par. 25. And, further, acknowledgment goes only, or primarily, to the proof, permitting the instrument, if properly acknowledged, to be offered in evidence without further showing as to its genuineness: ZILVITIS v. SZCZUDLO, et al. (1951) 409 Ill. 252, and here there was no real question of proof anyway, - the defendant-appellant's pleading admitted the execution and delivery of the instrument.

The defendant-appellant next argues that the Court erred in the admission of evidence, - that the time slips and ledger cards of Lundy, Butler, & Lundy, as to the Hazel R. Messer account, were not admissible, - that there was insufficient foundation proof, they were not permanent or original records, the time slips contained opinions and conclusions, and the day book or journal should have been introduced instead of the ledger cards. The abstract indicates an offer, towards the end of the plaintiffs' case, of a large number of plaintiffs' exhibits, some 35 or so in number, including the time slips and ledger cards, and some of the exhibits, particularly the time slips and ledger cards, consist of a large number of documents; counsel for the defendant-appellant then said: "Well, we object to the introduction of all the exhibits, Your Honor"; there-

after the exhibits were admitted in evidence, including the time slips and ledger cards. Prior to that, when Mr. Butler, one of the plaintiffs-appellees was testifying as to the time slips and ledger cards and the information contained therein the abstract indicates no objections at all by the defendant-appellant to the testimony. It has been settled by a long line of cases that a party objecting to evidence must point out the objections specifically so as to afford the adverse party an opportunity to correct it, if necessary: ILLINOIS LUMBER CO. v. RHEIN et al. (1938) 369 Ill. 584; a party who seeks to exclude a piece of evidence should be explicit, and disclose to the trial court all claimed defects in the proposed proof which he expects to urge upon this Court in the event of an appeal, - an objection to testimony, to be availed of in this Court, must be raised in the trial court in apt time and in a proper way, when the evidence is offered: FOREST PRESERVE DISTRICT etc. v. LEHMANN ESTATE, INC. (1944) 388 Ill. 416; a general objection will not avail where, if it had been specific, the objection (if sound) might have been obviated: MERCHANTS etc. BANK etc. et al. v. DAWDY et al. (1907) 230 Ill. 199. The defendant-appellant's objection to the offer of the exhibits was, at best, general only, and, in view of that and the lack of objections to the prior testimony as to such, this point may not be availed of here.

The next point urged by the defendant-appellant is that there is no evidence showing the reasonableness of the attorneys' fees allowed for the fees of the attorneys for the plaintiffs mortgagees in this foreclosure suit in the amount of \$1256.79, which the decree finds to be the reasonable fees for that purpose. The appellees evidently admit there was no specific evidence thereon for no testimony is abstracted on that. The court determined

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the attorneys fee at the amount indicated, but we are unable to see on what evidentiary basis that was done. The appellees in their brief assert that the fee allowed was the minimum fee for an average default foreclosure permissible under the schedule or rules of the local County Bar Association, but such schedule or rules were not in evidence, and we do not understand that either we or the trial court can take judicial notice thereof. We are of the opinion that proof should have been taken fixing the value of the attorneys fees of the attorneys for the plaintiffs mortgagees herein with the other evidence in chief to support the complaint: THE UNITY COMPANY v. FURNITABLE TRUST COMPANY et al. (1903) 204 Ill. 595, and the amount to be allowed should have been determined from such evidence and the Court's own knowledge of the services rendered and the reasonable value thereof: ROE v. HINGSTROM et al. (1928) 250 Ill. App. 440. The decree is in error to that extent.

The last three points of the defendant-appellant, - that the evidence is insufficient to support the decree, the decree is void, and she did not have a fair trial, are not argued, no authorities are referred to in support thereof, and they need not be further considered.

For the reason indicated, the decree of foreclosure must be and is reversed and the cause remanded with directions to find and determine the amount due and owing the plaintiffs under the terms of the instruments concerned excluding the item of attorneys fee in the sum of \$1256.79, and to enter an appropriate foreclosure decree.

REVERSED AND REMANDED

With Directions.

Wright, J. Concur

Solfisburg, P. J. and Wright, J. Concur.

Solfsburg, P. J. and Wright, J. Concur.

Wm. P. P. P.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

and the latter is so much to the right.

The last three points of the correspondence, - the
question is transferred to support the motion, the motion is made.
and the last point is left, the last point, the last point is
transferred to the support motion, and the last point is transferred.

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Abstract

General No. 11358

(Abstract only)

Agenda 6

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
(First Division)
FEBRUARY TERM, A.D. 1960

FILED

MAY 16 1960

PAUL V. WUNDER
Clerk Appellate Court Second District

EVELYN GALLASSI,

Plaintiff-Appellee,

vs.

HAROLD E. REAM,

Defendant-Appellant.

Appeal from the
Circuit Court of
LaSalle County

25 I.A.^{2d} 530¹

SPIVEY--J.

This is an action for damages for personal injuries brought by a guest passenger in an automobile against the driver. The incident in which the plaintiff was allegedly injured occurred in the State of Iowa. The jury returned a verdict for the plaintiff in the sum of Two Thousand Three Hundred Dollars, upon which the court entered judgment from which this appeal is taken.

The case involved the application of the Iowa Guest Statute, which permits recovery for recklessness on the part of the driver.

The only issue raised on appeal is whether the court under the evidence erred in denying defendant's motion for a directed verdict, or, in the alternative, denying defendant's motion for judgment notwithstanding the verdict. The same tests apply to either motion and are not at all unlike the established law in Illinois.

SECRET

OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, D.C.

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

RECEIVED

MAY 1 1961

U.S. DEPT. OF JUSTICE

PAUL V. WHITTAKER

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The statute under consideration is Section 321.494 of the Motor Vehicle Law of the State of Iowa which provides,

"The owner or operator of a motor vehicle shall not be liable for any damage to any passenger or person riding in said motor vehicle as a guest or by invitation or not for hire, unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor, or because of the reckless operation by him of such motor vehicle."

There is no dispute that the relationship of the parties at the time of the occurrence was one contemplated by the provisions of Section 321.494 as it applies to reckless operation.

The evidence in so far as it is germane to this appeal presents very little conflict.

The parties, together with the defendant's wife and young son, were returning from a trip to South Dakota. The defendant was driving east on U. S. Route 30 with his wife seated beside him in the front seat, his son in the left hand rear seat, and the plaintiff in the right hand rear seat. It was getting dark at the time of the occurrence, and vehicles on the highway had their lights on.

It had been prearranged that they would stop at a certain motel with a restaurant in connection located on the north side of the highway. There were two entrances to the motel and restaurant. As they approached their destination, the defendant passed the westernmost entrance due to the heavy traffic conditions and continued slowly eastward to the east entrance where he made an appropriate left hand signal and turned left to enter the driveway. At that time there was no visible traffic from the east. About a half ~~xx~~ mile east of this entrance there was the crest of a slight hill.

The defendant, in making his left turn, misjudged the

[illegible]

width of the driveway and found that if he proceeded any further into the driveway, the right hand side of his car would go into a slight drop-off. He stopped his car with the rear two-thirds extending into the westbound lane of the highway.

The defendant testified that after he stopped his car he looked to the east and observed no traffic coming, but very shortly, the exact time he did not know, he saw a car coming from the east over the crest of the hill at approximately sixty miles per hour. He remained in this position, neither moving forward nor backward, until the impact. He did not back up because eastbound traffic was passing behind him. As the westbound car got closer he knew it was going to hit them because it did not seem to slow down. His car was grey in color.

The defendant's wife testified that upon stopping her husband requested her to look for traffic from the east, and that she saw none. She looked to the west and saw oncoming traffic and upon again looking to the east she saw headlights bearing down on them at a terrific speed, easily eighty miles per hour. That thirty or forty seconds elapsed from her first look to the east until she looked back and saw the headlights. She further stated that her husband put the car in reverse but she did not recall him backing up.

Plaintiff, Evelyn Gallassi, testified that after the car stopped, defendant backed up further on the highway, and then did not move forward but just sat there. No traffic was coming from the west. She first saw the eastbound car a block and a half or two blocks away coming at a terrific rate.

The test we must apply, in order that we may as a matter of law say that the defendant was not guilty of a reckless operation of his motor vehicle, is well stated in Herbert v. Allen et al., 41 N.W. 2d. 240 (Iowa) wherein it was said,

right of the driveway and found that it was occupied and blocked
into the driveway, and right hand side of the car was in line
a little way off. He stopped his car with the front wheel
resting into the driveway lane of the driveway.

The defendant testified that after he stopped his car
he looked to the east and observed a white sedan, the very
specie, and about five or six feet away, he saw a car coming
from the east over the crest of the hill at approximately right
angle per foot. He testified he was looking toward the
driving lane driveway, until the instant, he did not look to the
east driveway until he was passing behind him. As the defendant
car got closer he saw it was going to hit him because it did
not seem to slow down. The car was very close.

The defendant's wife testified that when she saw the
defendant, she started out to look for the car, and that
she saw the car. She looked to the west and saw the defendant's car
and when she looked to the east she saw the defendant's car
come on down at a driving speed, toward right, after her car.
That instant on which she saw the car she then look to the
east until she looked back and saw the defendant. She testified
that she was looking at the car in the driveway and she did not
recall any warning of.

Defendant's wife testified that after the
car stopped, defendant looked to the west on the driveway, and
then did not move toward the car and stop. Defendant was
coming from the west. The first car was stopped on a block
and a half or two blocks away from the driveway.

The fact we must recall is when the car was
stopped at the driveway, the defendant was not looking at a right
hand operation at the other vehicle, as well stated in Report
of April 21, 1961, at 11:00, and (Note) witness in the same.

"On a motion for directed verdict the evidence must be viewed in the light most favorable to the one against whom the motion is directed. Odegard v. Gregerson, 234 Iowa 325, 12 N.W. 2d. 559. Plaintiff was entitled to every legitimate inference from the facts shown. Degelaw v. Wight, 114 Iowa 52, 86 N.W. 36. He was entitled to have taken as established every fact which his evidence fairly tended to prove. Hartman v. Chicago G. W. Ry. Co., 132 Iowa 582, 110 N.W. 10. The evidence should have been given 'the strongest interpretation in his favor.' Baker v. Langan, 165 Iowa 346, 145 N.W. 513, 518. He was entitled 'to the benefit of all the facts which the evidence offered by him tends to prove, giving them the most favorable construction of which they are fairly susceptible in support of his claim.' Thompson v. Cudahy Packing Co., 171 Iowa 579, 151 N.W. 470, 471.

"In one of our recent decisions we said: 'The established rule is that before a court is warranted in directing a verdict, every fact favorable to the party against whom the verdict is asked, and which the evidence tends to prove, must be conceded.' (Italics supplied.) Comfort v. Continental Casualty Co., 239 Iowa 1206, 34 N.W. 2d. 588, 589.

"'Even where evidence is undisputed, if different inferences may reasonably by (sic) drawn from it, it is for the jury to say what inferences shall be drawn, and they may be guided to their conclusion by the rule as to the burden of proof.' Ft. Dodge Hotel Co. v. Bartelt, 8 Cir., 1941, 119 F. 2d. 253, 259.

"'The court, however, is not at liberty to select one of various inferences that may be drawn from the evidence, and upon that determine the case as upon a question of law. It is for the jury, and not the court, to determine what inference is to be deduced from the facts proven.' Olson v. Southern Surety Co., 201 Iowa 1334, 1343, 208 N.W. 213, 217.

[illegible]

"The plaintiff is, of course, entitled to have the benefit of all favorable inferences which reasonably may be drawn from the evidence.' Russell v. Turner, 8 Cir., 1945, 148 F. 2d. 562, 565."

The lone question to be decided is whether or not the defendant was guilty of a reckless operation of his motor vehicle. This question must be answered by the wording of Section 321.494, the interpretation of that section by the reviewing courts of Iowa and within the scope of the limitations placed on reviewing courts in questions of directed verdicts.

A number of cases construing the meaning of "reckless operation" in that section have been cited by both the plaintiff and defendant and as to the meaning they are in harmony.

In Siessenger v. Puth, 248 N.W. 352 (Iowa) it was said quoting from a former opinion involving the same parties, "In light of the circumstances under which said chapter 119 was passed [Code 1931, § 5026-b1] it is apparent, we think, that the Legislature intended the word 'reckless' therein to mean 'proceeding without heed of or concern for consequences.' To be 'reckless', one must be more than 'negligent'. Recklessness may include 'willfulness' or 'wantonness', but if the conduct is more than negligent, it may be 'reckless' without being 'willful' or 'wanton', but to be reckless in contemplation of the statute under consideration, one must be more than negligent. Recklessness implies 'no care, coupled with disregard for consequences.'"

The Supreme Court of Iowa in Mescher v. Brogan, 272 N.W. 645, adopted the quoted portion of the Siessenger v. Puth case. The court further had this to say. "'Recklessness' is said to be conduct amounting to more than negligence. The surrounding circumstances in each particular case enter and must be

The plaintiff is, of course, entitled to have the

benefit of all favorable inferences which may be

drawn from the evidence. Russell v. Russell, 5 Cal. 2d 191.

100 W. 2d 451, 452.

The law domestic is in accord in relation to the

defendant was held, at a hearing before the court, that

this question must be answered by the finding of fact in the

the interpretation of that section of the evidence is

and the finding of fact of the defendant's place of

residence in question of the defendant's

A number of cases have been cited in support of the

position in this case that the defendant's place of

residence is to be determined by the facts.

In Russell v. Russell, 5 Cal. 2d 191, 100 W. 2d 451, it was held

that from a family which is living in one house, the

fact of the defendant's residence with the plaintiff is

to be determined by the facts, and the fact that the

defendant is living in the plaintiff's house is not

without proof of an agreement for cohabitation, or the

fact of cohabitation, or the fact of cohabitation

is not sufficient, but it is a fact which is not

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The Supreme Court of Iowa in Russell v. Russell, 5 Cal.

2d 191, 100 W. 2d 451, held that the fact of cohabitation is

not sufficient, but it is a fact which is not

disputed, and the fact of cohabitation is not

disputed, and the fact of cohabitation is not

considered in determining the question. As the danger becomes more manifest and apparent, the degree of care and caution must likewise increase."

The court continued again quoting from the Siessenger case, "Recklessness is an inference of fact to be drawn from the evidence offered, and is a matter for the determination of the jury. [Citing cases.] The same rule of law as to the sufficiency of the evidence in negligence cases should also apply to cases involving recklessness. It is the well settled law in negligence cases that if there is any evidence tending to show negligence, that question should be submitted to the jury. So likewise, in recklessness cases it should also be the rule that if there is any evidence tending to establish the charge of recklessness, that question should also be submitted to the jury. To hold otherwise in this case would invade the province of the jury." To like effect, Peter v. Thomas, 2 N.W. 2d. 643.

The court went on to say quoting from Wright v. What Cheer Clay Products Co., 267 N.W. 92 (Iowa), "It is not sufficient to show negligence, but the plaintiff must go further than this and show a rash, heedless, disregard for danger that would be apparent to or reasonably anticipated by a person exercising ordinary prudence and caution under existing circumstances."

(Emphasis supplied) Continuing the court said one does not need to act willfully or wantonly or with intent to injure in order to be reckless within the meaning of the statute.

Again continuing, the court said, "It is the actions and conduct, and not the mental attitude of the actor, that measure the degree of care and determines whether or not one is proceeding without heed of, or concern for, consequences, and with heedless disregard for, or indifference to, the rights of others."

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

to be received from the Bureau of the Census.

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In Crowell v. Demo, 1 N.W. 2d. 93 (Iowa), the court stated, "It was not a case of driving into a possible danger as in Roberts v. Koons, supra, or Wion v. Hayes, 220 Iowa 156, 261 N.W. 531. We said in Mescher v. Brogan, 223 Iowa 573, 272 N.W. 645, that one driving into a danger reasonably to be anticipated might be guilty of recklessness. In the case at bar the danger was not only probable. It was visible and apparent. (Citing cases). And the jury was not required to accept appellant's excuse that he thought he could pass the object or could stop. It was for the jury to say whether or not, under all the circumstances shown in evidence, appellant was guilty of recklessness which was the proximate cause of the collision."

In Nesci v. Willey, 75 N.W. 2d. 257 (Iowa), it was said, "There must be an awareness, actual or constructive, of the unusual danger presented by the circumstances, and also a manifestation of 'no care'. Schneider v. Parish, supra. We have frequently and consistently held that conduct arising from mere inadvertance, thoughtlessness or error in Judgment, is not reckless. (Citing cases)"

In Peter v. Thomas, 2 N.W. 2d. 643 (Iowa), the court in quoting from Roberts v. Koons, 296 N.W. 814 (Iowa), "To constitute recklessness under the Guest Statute, conduct must be more than negligent and must be such as to manifest a heedless disregard for, or indifference to, the rights of others or an indifference to or heedless disregard for consequences. It need not involve moral turpitude nor wanton and wilful conduct. The test is the acts and omissions of the driver. See Fraser v. Brannegan, [228 Iowa 572], 293 N.W. 50, and other authorities there discussed." (Emphasis supplied).

The court went on to say, "We conclude from the entire record, there was nothing in defendant Willey's operation of the

It is the duty of the Court to see that the law is applied to the facts of the case. In the case of United States v. Smith, 100 U.S. 197, 201, the Court said: "The duty of the Court is to see that the law is applied to the facts of the case." This is the duty of the Court in every case.

[illegible][illegible]

1. The court held on 21 May 1994 that the evidence was not sufficient to establish that the defendant was guilty of the offence of conspiracy to defraud.

car which indicated he or anyone else was aware of immediate danger under the existing circumstances. Danger on the highway is a relative term, of course, for we must recognize today there is danger for anyone to operate a car upon any highway, but by danger we mean here a sense of impending injury or damage to one's person or property generated by existing circumstances."

Again we quote from the Mescher v. Brogan case which states, "No amount of explanation can add much to the meaning to be implied from the use of the word 'reckless'. The difficulty comes in applying the rule to the facts in any particular case."

Briefly, we glean from the rules laid down by the Iowa courts that recklessness consists of something more than negligence, whether it be an overt act or an omission to act, when confronted with a known danger or an apparent danger which could be reasonably anticipated by a person exercising ordinary care under existing circumstances and when faced with such danger the driver acts without care and regard for consequences. If there is any evidence fairly tending to establish these conditions, the question is one of fact for the jury.

Defendant-appellant cites as authority for the proposition that the court erred in not directing a verdict. Peter-son v. Detwiller, 255 N.W. 529 (Iowa); Russell v. Turner, 56 Fed. Supp. 455; Harvey v. Clark, 6 N.W. 2d. 144 (Iowa); Peter v. Thomas, 2 N.W. 2d. 643 (Iowa); Christensen v. Scheldon, 63 N.W. 2d. 892 (Iowa); and Nesci v. Willey, 75 N.W. 2d. 257 (Iowa).

We have examined each of these cases and find that in affirming the trial court's allowance of a directed verdict or the jury's verdict for the defendant, that there was an absence of a suitable showing by the plaintiff that the defendant was aware of the known danger or an apparent danger which could have

been anticipated by a driver exercising ordinary care under the circumstances.

Returning now to the facts in the instant case, we find that they fairly tend to establish recklessness on the part of the defendant, and being such, it was a question of fact for the jury which they answered in the affirmative. We cannot say that all reasonable minds would conclude to the contrary.

The evidence viewed in the light most favorable to the plaintiff establishes that the defendant permitted two-thirds of his car to remain crosswise to the westbound lane of traffic on what had been a moment before a heavily travelled highway in both directions; no cars were coming from the west to prevent him from backing up, and that he did in fact back up so as to gain entrance to the driveway; defendant did not again pull forward but remained crosswise of the westbound lane; all occupants with the probable exception of defendant's young son were aware of a car approaching at a high rate of speed from the east for a half~~xx~~ mile; defendant knew that they were going to be hit broadside; and that only a slight ditch lay before him.

Defendant's omission to remove his car from a known danger apparent to him under the conditions in our opinion shows a lack of care without regard to consequences for his guest passenger.

The trial court properly denied defendant's motions for directed verdict and for judgment notwithstanding the verdict. The judgment of the Circuit Court is affirmed.

¶ Affirmed.

McNeal, P. J., and Dove, J., concur.

100-443887-100

DATE OF DEATH: 11/11/1918

Licenses, P. 7., and Dove, 7., correct.

Abstract

General No. 11372

(Abstract only)

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
(First Division)
FEBRUARY TERM, A. D. 1960

FILED

MAY 16 1960

PAUL V. WUNDER
Clerk Appellate Court Second District

HARRIET SMITH and HARRY E. SMITH,
Plaintiffs-Appellants,

vs.

DOROTHY PARKER and JAMES POOLE,
Defendants-Appellees.

Appeal from the
Circuit Court of
Grundy County.

25 I.A.^{2d} 530²

SPIVEY--J.

This is an action by Doctor Harry Smith and his wife, Harriet Smith, seeking judgments for damages for personal injuries against the defendants, James Poole and Dorothy Parker, jointly and severally. Plaintiffs sustained injuries in an automobile collision which occurred on June 1, 1957. In the trial herein, the jury returned verdicts for each Plaintiff against the Defendant Poole, only, and found the Defendant Parker not guilty. By their post trial motion, both Plaintiffs sought to have the trial court enter a judgment against both Defendants jointly, notwithstanding the jury's verdict in favor of the Defendant Parker. This motion was denied and Plaintiffs appeal from the order of the Circuit Court of Grundy County denying their post trial motion. The only error alleged in this Court is that the trial court erred in failing to grant them a judgment notwithstanding the verdict in favor of the Defendant Parker.

Abstract

(100-100000)

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IN THE

UNITED STATES COURT OF APPEALS

FILED

MAY 16 1950

PAUL V. WUNDER
Clerk Appellate Court Second District

SECOND DISTRICT
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Doctor Smith, one of the Plaintiffs, was operating his car in a northerly direction on Route 47, and was accompanied by his wife, Harriet, the other Plaintiff. They were meeting vehicles being driven by the Defendants, with the car driven by Parker ahead of the car operated by Poole. Parker desired to turn left from Route 47 onto an intersecting gravel road which formed a "T" intersection with Route 47. About one hundred feet north of the intersection, on Route 47, there was a bridge over a creek. When the Defendant Parker was on this bridge she applied her brakes, decreased the speed of her car and her brake lights were observed. She did not signal for a left turn but rather pulled her car to the right and was on the right edge of the pavement or slightly off. Poole had been following Parker and turned out to pass Parker when Parker was sixty to seventy-five feet north of the intersection. Poole and Smith collided in Smith's lane of traffic. The collision occurred about thirty feet behind the Parker car when Parker's car was stopped, off or slightly on the right edge of the twenty-four foot highway opposite the gravel road. Poole was intoxicated at the time of the collision. In the trial court he defaulted and he has made no appearance in this court.

It is the contention of the plaintiffs that Defendant Parker was negligent as a matter of law in failing to signal a left hand turn, in failing to ascertain the movement of other traffic before changing from a direct course on the highway, stopping or suddenly decreasing her speed, and in failing to approach an intersection for a left hand turn near the center line of her lane. Plaintiffs reason that inasmuch as the jury returned a verdict for the Plaintiffs against Poole, they were found to be in the exercise of due care and so, if the Defendant Parker is negligent, they should recover against Parker also.

This argument overlooks the fact that Poole was defaulted and Plaintiffs right to recover against Poole was admitted by the default. Only the amount of damages remained to be determined so far as Poole was concerned. However, Parker is not bound by the default of Poole and she is entitled to have a jury determine, in addition to damages, the questions of due care, negligence and proximate cause. In Chamblin v. Chamblin, 362 Ill. 588, 593, 1 N.E. 2d. 73, the court said, "The default of one defendant is not an admission by the others, and does not relieve the complainant from the necessity of establishing his case against those who appear and plead. One defendant cannot admit a cause of action against his co-defendants who defend against it. (Glos v. Swanson, 227 Ill. 179). If the complainant must prove the issues as to the answering defendants, it follows that such defendants may meet and overcome, if they can, the evidence of the complainant. A judgment or decree against one defendant for want of a plea or answer does not prevent any other defendant from contesting, so far as respects himself, the very fact which is admitted by the other party."

Plaintiffs are entitled to prevail, as against Parker, only if there is no evidence taken with its intendments most favorable to the Defendant Parker, which tends to support the verdict of the jury finding Parker not guilty. The only question is whether or not the court erred in denying plaintiff's post trial motion seeking judgment notwithstanding the verdict.

"A motion for directed verdict or for judgment notwithstanding the verdict presents the single question whether there is in the record any evidence, which, standing alone and taken with all its intendments most favorable to the party resisting the motion, tends to prove the material elements of his case. Gorczynski Nugent, 402 Ill. 147; Weinstein v. Metropolitan Life Ins. Co., 389 Ill. 571." Lindroth v. Walgreen Co., 407 Ill. 121,

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94 N. E. 2d 647. See also Pennington v. McLean, 16 Ill. 2d. 577, 158 N. E. 2d 624; Romines v. Illinois Motor Freight Inc., 21 Ill. App. 2d 380, 158 N. E. 2d 97; Rohr v. Culver, 20 Ill. App. 2d 548, 156 N. E. 2d 770, and Marguerdt v. Cernocky, 18 Ill. App. 2d 135, 151 N. E. 2d 109; all cases from this court to the same effect.

Issues of negligence, proximate cause and due care are pre-eminently issues of fact for the jury. When the single question is presented as to the existence of any evidence to support the verdict of a jury, a court of review cannot weigh the evidence. If the verdict has any evidential basis, we can but affirm the judgment of the trier of the fact.

"It is not the function of the reviewing court to substitute its judgment for that of the jury upon controverted questions of fact. It is fundamental law in our jurisprudence that all controverted questions of fact, in a jury trial, must be submitted to the jury for decision. This is primarily the exclusive function of the jury, and to withdraw such questions from its consideration is to usurp its function. Wey v. Yellow Cab Co., 2 Ill. 2d 74." Geraghty v. Burr Oak Lanes, Inc., 5 Ill. 2d 153, 125 N. E. 2d 47.

It would serve no purpose to expand this opinion by suggestions of portions of the evidence supporting the verdict of the jury. No interrogatories were requested by the jury and for this reason we do not know what reason or reasons the jury may have had in deciding in favor of the Defendant Parker. The jury could have found that Parker was not negligent, that if she was negligent her conduct did not proximately cause Plaintiff's injuries, or they could have found that Plaintiffs themselves were not in the exercise of due care. Any or all of these findings would have been a bar to the plaintiffs' right of action against the Defendant Parker. There is implicit in the

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verdict in favor of the Defendant Parker a finding by the jury that one or all of these conditions did exist. Reviewing the evidence, we believe that such findings would have been supported by evidence and the trial court would have erred had the post trial motion been granted. Under these circumstances, this court must affirm the judgment of the trial court denying plaintiffs' post trial motion.

Judgment affirmed.

McNeal, P. J., and Dove, J., concur.

through the night and morning hours a steady rain fell
first and then the wind rose and the rain fell again.
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THE END

McNeal, P., and Rose, J., 1900.

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